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FOR: Any person who uses the Federal Register and Code of Federal Regulations.

WHO: The Office of the Federal Register.

WHAT: Free public briefings (approximately 3 hours) to present:
1. The regulatory process, with a focus on the Federal Register system and the public's role in the development of regulations.
2. The relationship between the Federal Register and Code of Federal Regulations.
3. The important elements of typical Federal Register documents.
4. An introduction to the finding aids of the FR/CFR system.

WHY: To provide the public with access to information necessary to research Federal agency regulations which directly affect them. There will be no discussion of specific agency regulations.

DENVER, CO

WHEN: September 26, at 9:00 am
WHERE: Denver Federal Center, Building 20 (E8 entrance on 2nd Street) Conference Room B1409, Denver, CO
RESERVATIONS: Federal Information Center 1–800–359–3997

WASHINGTON, DC

WHEN: September 30, at 9:00 am
WHERE: Office of the Federal Register First Floor Conference Room 1100 L Street, NW, Washington, DC
RESERVATIONS: 202–523–5240

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Reader Aids

Additional information, including a list of public laws, telephone numbers, and finding aids, appears in the Reader Aids section at the end of this issue.

CFR PARTS AFFECTED IN THIS ISSUE

A cumulative list of the parts affected this month can be found in the Reader Aids section at the end of this issue.

Rules and Regulations

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DEPARTMENT OF AGRICULTURE

Commodity Credit Corporation

7 CFR Part 1435

Sugar and Crystalline Fructose Information Reporting and Recordkeeping Requirements

AGENCY: Commodity Credit Corporation, USDA.

ACTION: Interim rule.

SUMMARY: This interim rule sets forth regulations for the collection and recordkeeping of information from sugarcane and sugar beet processors, sugar refiners and manufacturers of crystalline fructose. The information is required primarily by the Agricultural Adjustment Act of 1938, as amended. The information will be used to administer programs for sugarcane and sugar beet price support, sugar marketing allotments, and sugar data reports, and in determining the total quota amount of the tariff rate quota for imported sugar.

DATES: Interim rule effective October 1, 1991. Comments must be received on or before October 21, 1991 in order to be assured of consideration.

ADDRESSES: Interested persons are invited to submit written comments concerning this interim rule. Comments should be mailed or delivered to Dean Ethridge, Deputy Administrator for Program Planning and Development, Agricultural Stabilization and Conservation Service, room 3090, P.O. Box 2415, South Agriculture Building, U.S. Department of Agriculture, Washington, DC 20013. Comments received may be inspected between 9 a.m. and 4:30 p.m., Monday through Friday except holidays, in room 3741, South Agriculture Building, U.S. Department of Agriculture, 14th Street and Independence Avenue, Washington, DC.

FOR FURTHER INFORMATION CONTACT: Robert Barry, Assistant to the Deputy Administrator for Program Planning and Development, Agricultural Stabilization and Conservation Service, room 3741, South Agriculture Building, U.S. Department of Agriculture, Washington, DC; telephone: (202) 447–3391. Preliminary regulatory and impact analyses are available from the above-named person.

SUPPLEMENTARY INFORMATION: This interim rule has been reviewed under United States Department of Agriculture (USDA) procedures implementing Executive Order 12291 and Departmental Regulation 1512–1 and has been classified as "not major." It has been determined that the provisions of this interim rule will not result in: (1) An annual effect on the economy of $100 million or more; (2) major increases in costs or prices for consumers, individual industries, Federal, State or local government agencies, or geographic regions; or (3) significant adverse effects on competition, employment, investment, productivity, innovation, or the ability of United States-based enterprises to compete in domestic or export markets.

It has been determined by an environmental evaluation that this action will not have a significant impact on the quality of the human environment. Therefore, an Environmental Assessment and an Environmental Impact Statement are not necessary for this interim rule.

This interim rule contains information collections which are subject to review by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980 (44 U.S.C. chapter 35). A request for expedited review of the information collections is being forwarded to OMB (See attachments 1 through 5). The public reporting burden for these collections of information is estimated to vary from 60 to 120 minutes per response, with an average of 90 minutes per response including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of Agriculture, Clearance Officer, OIRM, room 404–W, Washington, DC 20250; and to the Office of Management and Budget, Paperwork Reduction Project, Washington, DC 20503.

The program covered by this interim rule is not subject to the provisions of Executive Order 12372 which requires intergovernmental consultation with State and local officials. See the notice related to 7 CFR part 3015, subpart V, published at 48 FR 29115 (June 24, 1983).

Statutory Background

Various federal statutes impose responsibilities on the Secretary of Agriculture with respect to supporting and protecting the domestic sugar industry. These responsibilities of the Secretary, discussed below, make the collection of comprehensive information with respect to the supply and demand for sugar necessary.

Section 206 of the Agricultural Act of 1949 (7 U.S.C. 1446g), as amended (the "1949 Act"), generally requires the Secretary of Agriculture to support, through nonrecourse loans, the prices of each of the 1991 through 1995 crops of sugar beets and sugarcane. With respect to sugarcane, section 206(b) requires price support "at such level as the Secretary determines appropriate, but not less than 18 cents per pound for raw cane sugar." With respect to sugar beets, section 206(c) mandates price support "at such level * * * as the Secretary determines reflects—(1) an amount that bears the same relation to the support level for the crop of sugarcane * * * as the weighted average of producer returns for sugar beets bears to the weighted average of producer returns for sugarcane, expressed on a cents per pound basis for refined beet sugar and raw sugar, for the most recent 5-year period for which data are available; plus (2) an amount that covers sugar beet processor fixed marketing expenses." In addition, section 206(d)(1) of the 1949 Act authorizes the Secretary to "increase the support price for each of the 1991 through 1995 crops of domestically grown sugarcane and sugar beets from the price determined for the preceding crop based on such factors as the Secretary determines appropriate, including changes (during the 2 crop years immediately preceding the crop year for which the determination is

made) in the cost of sugar products, the cost of domestic sugar production, and other circumstances that may adversely affect domestic sugar production."

Additional U.S. note 3(a)(i) to chapter 17 of the Harmonized Tariff Schedule (HTS) provides that the Secretary of Agriculture shall determine the total amount of sugars, syrups and molasses that may be entered, or withdrawn from warehouse for consumption, under the lower tariff rates of the tariff-rate quota for imported sugars, syrups, and molasses. The Secretary is required to determine such total amount "as will give due consideration to the interests in the U.S. sugar market of domestic producers and materially affected contracting parties to the General Agreement on Tariffs and Trade." Additional U.S. note 3(a)(ii) further authorizes the Secretary to modify such total amount (including the time period for which such limitations are applicable), if the Secretary determines that such action is appropriate in light of such interests.

Section 359a(a) of the Agricultural Adjustment Act of 1938 (7 U.S.C. 1359aa(a)), as amended (the "1938 Act"), requires all cane sugar refiners, sugar beet processors, and manufacturers of crystalline fructose from corn to furnish the Secretary of Agriculture, on a monthly basis, such information as the Secretary may require with respect to the person's importation, distribution, and stock levels of sugar or crystalline fructose, respectively. Section 359a(c) requires the Secretary to publish, on a monthly basis, composite data on imports, distribution, and stock levels of sugar and crystalline fructose.

Section 359b(a) of the 1938 Act (7 U.S.C. 1359bb(a)), requires the Secretary of Agriculture to make, for fiscal years 1992 through 1996, annual estimates and quarterly reestimates of "(A) the quantity of sugar that will be consumed in the customs territory of the United States during the fiscal year (other than sugar imported for purposes other than human consumption); (B) the quantity of sugar that will be available from carry-in stocks or from domestically-produced sugarcane and sugar beets for consumption in the United States during the year; and (C) the quantity of sugar that will be imported for consumption during the year (other than sugar imported for purposes other than human consumption), based on the differences between—(i) The quantity of estimated consumption; and (ii) the quantity of sugar estimated to be available from domestically-produced sugarcane and sugar beets and from carry-in stocks."

Sections 359b(b) and 359b(c) of the 1938 Act (7 U.S.C. 1359bb(b) and (c)), require the Secretary to establish allotments for the marketing of sugar by processors of sugar from domestically-produced sugarcane and sugar beets and allotments for the marketing of crystalline fructose by manufacturers of crystalline fructose manufactured from corn if the estimate, made under section 359b(a) of the 1938 Act, for imports of sugar for consumption in the United States is less than 1,250,000 short tons, raw value. If such marketing allotments are required, further provisions of the 1938 Act require the Secretary to do the following:

(1) Establish the overall allotment quantity by deducting carry-in stocks and 1,250,000 short tons, raw value, from the estimated sugar consumption for the fiscal year;

(2) Establish percentage factors (based on past marketings of sugar, processing and refining capacity, and the ability of processors to market the sugar covered under the allotments) for alloting the overall allotment quantity among sugar derived from sugar beets and sugar derived from sugarcane;

(3) Further allot the allotment for sugar derived from sugarcane among the five sugarcane-producing States in the United States (based on past marketings of sugar, processing capacity, and the ability of processors to market the sugar covered and the allotments);

(4) Make allocations to processors of the cane sugar and beet sugar allotments, in such manner and in such quantities as to provide a fair, efficient, and equitable distribution of the allocations (taking into consideration processing capacity, past marketings of sugar, and the ability of each processor to market sugar covered by that portion of the allotment allocated to it);

(5) Determine, for certain sugarcane producing States, whether the production of sugar in the absence of proportionate shares will be greater than the quantity needed to enable processors to fill the State's allotment and provide a normal carryover inventory, and if so, establish such proportionate shares for the crop of sugarcane that is harvested during the fiscal year the allotment is in effect (according to a detailed statutory formula which makes necessary the further determination of each affected State's per-acre yield goal and the acreage base for each sugarcane-producing farm);

(6) Adjust or suspend, as the Secretary determines to be fair and equitable, marketing allotments, allocations and proportionate shares, based on changes in estimated sugar consumption, availability, or imports;

(7) From the processors allocated a share of an allotment, obtain adequate assurances that the allocation will be shared among producers served by the processor in a fair and equitable manner that adequately reflects the producers' production histories;

(8) Resolve, through arbitration, any dispute between a processor and a producer, or group of producers, with respect to the sharing of the processor's allocation, on the request of either party;

(9) Determine whether (based on current inventories of sugar, the estimated production of sugar and expected marketings, and other pertinent factors) processors of sugarcane and sugar beets will be able to market the quantities of sugar allocated to them and, if not, reassign the estimated quantity of the deficit proportionately to the allocations for other processors (depending on the capacity of each other processor to fill the portion of the deficit to be assigned to it) or to imports;

(10) Impose civil penalties for violations of certain of the statutory provisions and any of the regulations; and

(11) Make various other determinations.

Section 22 of the Agricultural Adjustment Act of 1933 (7 U.S.C. 624), as amended ("Section 22"), authorizes the imposition of fees or quotas on imported articles whenever the President finds that such articles are being imported, or are practically certain to be imported into the United States, under such conditions and in such quantities as to render or tend to render ineffective, or materially interfere with, certain programs or operations with respect to any agricultural commodity or product (including the price support program for sugarcane and sugar beets and the marketing allotment program for sugar and crystalline fructose), or as to reduce substantially the amount of any product processed in the United States from a commodity or product included in such programs or operations. Under section 22, whenever the Secretary of Agriculture has reason to believe that the foregoing criteria have been met, he must advise the President, and if the President agrees that there is reason for such belief, he must request an investigation by the International Trade Commission.

Finally, section 902(a) of the Food Security Act of 1985, as amended (7 U.S.C. 1446 note), provides that "the President shall use all authorities available to the President as is necessary to enable the Secretary of Agriculture to operate the sugar program

established under section 206 of the Agricultural Act of 1949 at no cost to the Federal government by preventing the accumulation of sugar acquired by the Commodity Credit Corporation." In addition, section 359c(b)(2) of the 1938 Act, as amended, requires the Secretary to adjust the overall allotment quantity (if any is established in conjunction with marketing allotments) "to the maximum extent practicable to prevent the accumulation of sugar acquired by the Commodity Credit Corporation."

In summary, the Secretary of Agriculture is required by law to achieve, without significant expenditure of federal funds, a range of objectives with respect to maintaining market prices for raw and refined sugar, controlling domestic and imported supplies, and meeting the international obligations of the United States. Under these circumstances, it is necessary for the Secretary to collect comprehensive information on the activities of the principal domestic participants in the U.S. sugar market. Clearly, in order to maintain a "no cost" price support program, the Secretary must constantly obtain information on all significant activities and trends that affect domestic prices and the supply and demand for sugar.

Prior Consultations With Interested Parties

Section 359h(a)(2) of the 1938 Act, as amended, provides that prior to proposing any regulations to implement part VII of subtitle B of title III, the Secretary of Agriculture shall consult with representatives of domestic sugar processors and producers with regard to ensuring that the regulations achieve the objectives of part VII. On April 19, 1991 such prior consultations were held with such representatives and other interested parties. The principal suggestions of the private sector participants with respect to information collection were as follows: (1) USDA should provide a single data collection point; (2) USDA should request historical production data and earlier and more frequent production forecast data for sugar beets, sugarcane, and processed sugar; (3) USDA should increase data collection on corn sweeteners, caloric/non-caloric sweeteners, and imports of sugar containing products and sugar blends; (4) USDA should provide a public hearing by September 1 of each year to allow interested private-sector parties to present their estimates of production and consumption; and (5) USDA should safeguard the confidentiality of proprietary information.

Summary of the Provisions of This Interim Rule

This interim rule creates a new subpart which sets forth requirements for the monthly reporting—by sugarcane and sugar beet processors and by cane sugar refiners to the Commodity Credit Corporation—of information on sugar imports and other receipts, processing operations, production, distribution, stocks, average recovery rates, and plant capacities. In addition, manufacturers of crystalline fructose will be required to submit monthly reports of their imports, distributions, and stocks of crystalline fructose. Failure to furnish the information may result in a civil penalty being imposed upon the processor, refiner, or manufacturer.

The information collected pursuant to this subpart will be used primarily in administering the domestic price support program for sugarcane and sugar beets, making the necessary estimates and determinations required by the standby marketing allotment program for sugar and crystalline fructose, monitoring to detect whether imported articles are causing material interference with these programs and establishing the total quota amount for entries of imported sugar under the lower tier duties of the tariff-rate quota. Abstracts of the data collected will be published by USDA on a monthly and cumulative basis.

This interim rule provides that information needs will be achieved by applicable persons completing new ASCS forms (ASCS–841 through ASCS–845). Copies of these forms are published immediately following this interim rule.

List of Subjects in 7 CFR Part 1435

Loan programs/agriculture, Price support programs, Reporting and recordkeeping requirements, Sugar, Crystalline fructose.

Accordingly, 7 CFR part 1435 is amended by adding a new subpart as follows:

PART 1435—SUGAR

Subpart—Sugar and Crystalline Fructose Information Reporting and Recordkeeping Requirements

Sec.

Exhibits—Forms

Subpart—Sugar and Crystalline Fructose Information Reporting and Recordkeeping Requirements

Authority: 7 U.S.C. 1359aa, 1359hh(a)(1), 1446(a); additional U.S. note 3(a) to chapter 17 of the Harmonized Tariff Schedule of the United States (HHTS).

§ 1435.400 General statement.

(a) This subpart sets forth the requirements and conditions for reporting and preserving information on sugar imports and other receipts, processing operations, production, distribution, stocks, average recovery rates, and plant capacities to the Commodity Credit Corporation (CCC). This information is necessary to carry out the domestic price support, marketing allotment and other programs for sugar.

(b) The sugar and crystalline fructose information reporting and recordkeeping program shall be administered under the general supervision of the Executive, Vice President, CCC (Administrator, Agricultural Stabilization and Conservation Service (ASCS)).

§ 1435.401 Definitions.

The definitions set forth in this section shall be applicable to terms used in this subpart.

ASCS means the Agricultural Stabilization and Conservation Service.

Average recovery rate means: (1) With respect to sugarcane processing, the pounds of raw sugar, raw value, produced per net ton of sugarcane ground;

(2) With respect to sugar beet processing, the pounds of refined sugar, raw value, produced per net ton of sugar beets sliced; or

(3) With respect to cane sugar refining, the pounds of refined sugar, raw value, produced per net ton of raw sugar processed.

Cane sugar refiner means any person who processes raw cane sugar into refined sugar or liquid sugar. The same person may be both a "cane sugar refiner" and either a "sugarcane processor" or "sugar beet processor" or both.

CCC means the Commodity Credit Corporation.

Crystalline fructose means a monosaccharide and reducing sugar, manufactured from field corn, appearing as free-flowing white crystals with the chemical formula $C_6H_{12}O_6$ and molecular weight of 180.16.

Desugaring molasses means molasses to be further processed for the production of refined sugar or liquid sugar.

Direct-consumption sugar means any sugar which is not to be further refined or improved in quality, whether such sugar is principally of crystalline structure or is liquid sugar or molasses.

Distribution means the sale or other disposition of sugar or crystalline fructose, including (but not limited to) the forfeiture of sugar to the CCC and the disposition of sugar or crystalline fructose for retail sale, for further processing or refining, for production of alcohol or feed, or for exportation.

Edible molasses means molasses which is not to be further refined or improved in quality and which is to be distributed for human consumption, either directly or in molasses-containing products.

Fiscal year means the year beginning October 1 and ending September 30.

Imports means sugar or crystalline fructose entered into the customs territory of the United States, whether or not the sugarcane processor, sugar beet processor, cane sugar refiner, or manufacturer of crystalline fructose was the importer of record or consignee of the imported sugar or crystalline fructose.

Inedible molasses means molasses other than edible molasses or desugaring molasses, including molasses to be used in producing animal feed.

Invert sugar means a mixture of glucose (dextrose) and fructose (levulose) formed by the hydrolysis of sucrose.

Liquid sugar means a finished sugar product which is not principally of crystalline structure and in which sucrose or the sucrose equivalent of invert sugars, or both, account for 70 percent or more of the total soluble solids.

Molasses means any thick syrup which is a byproduct of processing sugar beets or sugarcane, or of refining raw cane sugar, and in which sucrose or the sucrose equivalent of invert sugars, or both, account for less than 70 percent of the total soluble solids.

Person means an individual, corporation, association, marketing or processing cooperative, joint stock company, estate or trust, or other legal entity.

Plant capacity means the maximum capability, on a net short-tons-per-day basis, of a processing or refining facility to process sugar beets, sugarcane, or raw sugar.

Processing facility means a distinct physical facility, at a single location, which processes sugarcane, sugar beets, or molasses into sugar.

Processing inputs means the quantity of raw materials (e.g., sugarcane, sugar beets, raw sugar, molasses, etc.) used in processing or refining operations.

Production means the output of sugar (including molasses) from the processing by sugar beet processors or sugarcane processors of domestically produced sugar beets or sugarcane, respectively, or the output of sugar (including molasses) from the processing by cane sugar refiners of raw sugar or the reprocessing of damaged refined sugar.

Raw sugar means any sugar principally of crystalline structure testing less than 99.4 sugar degrees by the polariscope, whether or not such sugar is to be further refined or improved in quality.

Raw value of any quantity of sugar means its equivalent in terms of raw sugar testing ninety-six sugar degrees, as determined by a polarimetric test performed in accordance with procedures recognized by the International Commission for Uniform Methods of Sugar Analysis (ICUMSA). Sugar testing ninety-two sugar degrees or more by the polariscope shall be translated into terms of raw value in the following manner: raw value $= \{[(\text{actual degree of polarization} - 92) \times 0.0175] + 0.93\} \times$ actual weight. For example, with respect to sugar testing ninety-two sugar degrees by the polariscope, derive raw value by multiplying the actual number of pounds of such sugar by 0.93; for sugar testing more than ninety-two sugar degrees by the polariscope, derive raw value by multiplying the actual number of pounds of such sugar by the figure obtained by adding 0.93 to the result of multiplying 0.0175 by the number of degrees and fractions of a degree of polarization above ninety-two degrees. For sugar, testing less than ninety-two sugar degrees by the polariscope, derive raw value by dividing the number of pounds of the "total sugar content" (i.e., the sum of the sucrose and invert sugars) thereof by 0.972.

Receipts refers to the quantity of raw materials (e.g., sugarcane, sugar beets, raw sugar, refined sugar, liquid sugar, molasses, etc.) received by the processing or refining facility.

Refined sugar means white, crystalline sugar testing 99.4 or more sugar degrees by the polariscope.

Refining facility means a distinct physical facility, at a single location, which processes raw sugar into refined sugar.

Stocks means inventory of sugar or crystalline fructose on hand at the beginning, or at the end, of the calendar month for which data are being reported, as appropriate.

Sucrose means a disaccharide having the chemical formula $C_{12}H_{22}O_{11}$.

Sugar means any grade or type of saccharine product derived, directly or indirectly, from sugarcane or sugar beets and consisting of, or containing, sucrose or invert sugar, including all raw sugar, refined sugar, liquid sugar, and molasses.

Sugar beet processor means a person who commercially processes sugar beets or molasses into refined sugar or liquid sugar. The same person may be both a "sugar beet processor" and a "cane sugar refiner."

Sugarcane processor means a person who commercially processes sugarcane into raw sugar or molasses. The same person may be both a "sugarcane processor" and a "cane sugar refiner."

§ 1435.402 Duty to Report.

(a) *Monthly reports.* (1) Every sugar beet processor shall file, on a monthly basis, for each processing facility owned or operated by the processor, completed Forms CCC–831 and CCC–833 which accurately report each processing facility's imports and other receipts, processing inputs, production, distribution, stocks, average recovery rates, and plant capacity(ies).

(2) Every sugarcane processor shall file, on a monthly basis, for each processing facility owned or operated by the processor, completed Forms CCC–832 and CCC–833 which accurately report each processing facility's imports and other receipts, processing inputs, production, distribution, stocks, average recovery rates, and plant capacity(ies).

(3) Every cane sugar refiner shall file, on a monthly basis, for each refining facility owned or operated by the refiner, completed Forms CCC–833 and CCC–835 which accurately report each refining facility's imports and other receipts, processing inputs, production, distribution, stocks, average recovery rates, and plant capacity(ies).

(4) Every manufacturer of crystalline fructose shall file, on a monthly basis, a completed Form CCC–834 which accurately reports such manufacturer's distributions, imports and stocks of crystalline fructose.

(b) *Submission of reports.* (1) The initial month for which data are to be reported is October 1991, and the initial report must be received no later than November 21, 1991. Subsequent monthly reports must be received no later than 15 days after the end of the calendar month for which the data are reported.

(2) If the data item required to be reported in any month is identical to that reported for the previous month (e.g., with respect to plant capacity), the person submitting a report may simply

indicate "no change" for such data item on the appropriate form.

(3) Data reports shall be mailed or delivered to the U.S. Department of Agriculture, ASCS, DAPPD, room 3741-S, P.O. Box 2415, Washington, DC 20013 or transmitted to the FAX number provided on the report form.

§ 1435.403 Civil penalties.

(a) Any sugar beet processor, cane sugar refiner, or crystalline fructose manufacturer who willfully fails or refuses to furnish the data specified in section 1435.402 of this subpart on imports, stocks or distributions, or who willfully furnishes any false information with respect to such imports, stocks or distributions, shall be subject to a civil penalty of not more than $10,000 for each such violation.

(b) Any sugarcane processor who knowingly fails or refuses to furnish the data specified in section 1435.402(a)(2) of this subpart or who knowingly furnishes any false information, or any sugar beet processor, cane sugar refiner, or crystalline fructose manufacturer who knowingly fails or refuses to furnish the data specified in section 1435.402 of this subpart or who knowingly furnishes any false information, shall be subject to a civil penalty of not more than $5000 for each such violation.

(c) Civil penalties provided for by this section may be imposed by the Executive Vice President, CCC.

(d) Administrative appeal of any imposition of civil penalties shall be made by filing a timely notice of appeal, within 30 calendar days after the date of imposition, to the Director of the ASCS Appeals Division, ASCS, in Washington, DC.

§ 1435.404 Recordkeeping; Examination of Records.

(a) Each sugar beet processor, sugarcane processor, cane sugar refiner and manufacturer of crystalline fructose shall retain, for not less than three years from the date information was reported under § 1435.402 of this subpart, all books, records, accounts and other written data relevant to such person's imports, distribution, stocks, production and plant capacity(ies).

(b) CCC, the Office of the Inspector General, USDA, and the Comptroller General of the United States shall have the right to have access to the premises of any sugar beet processor, sugarcane processor, cane sugar refiner, or manufacturer of crystalline fructose, or of any other person having custody of records required to be retained by paragraph (a) of this section, in order to inspect, examine and make copies of such books, records, accounts, and other written data as are deemed necessary by the examining agency to verify compliance with the requirements of this part.

Exhibits—Forms

BILLING CODE 3410-05-M

ATTACHMENT # 1

Form Approved OMB No. 0560-9999

CCC-831 (Proposal 5)	U.S. Department of Agriculture Agricultural Stabilization and Conservation Service	THIS REPORT REFLECTS DATA FOR THE MONTH OF:

SUGAR PRODUCTION AND DISTRIBUTION REPORT: SUGAR BEET PROCESSORS

NOTE: The following statements are made in accordance with the Privacy Act of 1974 (5 USC 552a) and the Paperwork Reduction Act of 1980. The principal authority for requesting the information to be supplied on this form is the Agricultural Adjustment Act of 1938, as amended. The information will be used to administer various U.S. sugar programs. This information may shared with other agencies of the U.S. Department of Agriculture and may be published in composite form. Furnishing the requested information is mandatory; failure to furnish the correct, complete information will result in civil penalties. The provisions of criminal and civil fraud statutes, including 18 USC 286, 287, 371, 651, 1001; 15 USC 714m; and 31 USC 3729, may be applicable to information provided on this form. See 7 CFR Part 1435, Subpart --"Sugar and Crystalline Fructose Information Reporting and Recordkeeping Requirements" for applicable definitions, procedures, requirements, and penalties. Public reporting burden for this collection of information is estimated to average 20 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Agriculture, Clearance Officer, OIRM, Room 404-W, Washington, D.C. 20250; and to the Office of Management and Budget, Paperwork Reduction Project (OMB No. 0560-XXXX), Washington, D.C. 20503.

FROM: (Enter name of processor, address, and telephone number)	**TO:** USDA/ASCS/DAPPD Room 9999-S PO Box 2415 Washington, DC 20013 FAX NO:

PART I

Enter name and location of processing facility providing these data:	QUANTITY Use hundredweight *(CWT)* unless otherwise noted	
	ACTUAL WEIGHT	RAW VALUE
BEGINNING STOCKS OF SUGAR *(Inventories at the beginning of the month)*		
1. Beginning stocks of sugar *(including sugar held in custody by U.S. Customs Service)*		
a. Raw sugar		
b. Refined sugar		
c. Liquid sugar		
d. Molasses gallons →		
RECEIPTS OF RAW MATERIALS		
2. Receipts of sugar beets (net short tons)		
a. Domestically produced sugar beets		
b. Imported sugar beets		
3. Receipts of domestically produced sugar *(specify from whom in Part II)*		
a. Raw sugar *(also report on Form CCC-835)*		
b. Refined sugar		
c. Liquid sugar		
d. Molasses gallons →		

RECEIPTS OF RAW MATERIALS	QUANTITY Use hundredweight *(CWT)* unless otherwise noted	
	ACTUAL WEIGHT	RAW VALUE
4. Receipts of imported sugar		
a. Raw sugar *(also report on form CCC-835)*		
b. Refined sugar		
c. Liquid sugar		
d. Molasses gallons →		
PROCESSING INPUTS ***(raw materials used in processing)***		
5. Sugar beets sliced *(net short tons)*		
6. Molasses processed gallons →		
7. Refined sugar *(including damaged refined sugar)* processed		
8. Liquid sugar processed		
PRODUCTION ***(output of sugar)***		
9. Sugar production		
a. Refined sugar		
b. Liquid sugar		
c. Molasses Enter total here in gallons →		
(i) Edible molasses		
(ii) Inedible molasses		
(iii) Desugaring molasses		
DISTRIBUTION OF SUGAR (i.e., the sale or other disposition of sugar in commerce)		
10. Refined sugar Enter total here →		
a. Distributed to cane sugar refiners and sugar beet processors *(specify to whom in Part II)*		
b. Forfeited to the Commodity Credit Corporation *(CCC)*		
c. Distributed for the production of alcohol *(including alcoholic beverages, ethanol, and polyhydric alcohol)*		
d. Distributed for the production of animal feed *(including feed for pets and livestock)*		
e. Distributed for exportation from the customs territory of the United States.		
f. Distributed in Puerto Rico		
g. All other distributions		
11. Liquid sugar		
12. Molasses Enter total here in gallons →		

DISTRIBUTION OF SUGAR, *continued*	QUANTITY Use hundredweight *(CWT)* unless otherwise noted	
12. Molasses, continued	ACTUAL WEIGHT	RAW VALUE
a. Edible molasses		
b. Inedible molasses		
c. Desugaring molasses		
ENDING STOCKS OF SUGAR ***(Inventories at end of month)***		
13. Inventory adjustments *(indicate gain or loss)*		
14. Ending stocks		
a. Raw sugar		
b. Refined sugar		
c. Liquid sugar		
d. Molasses gallons →		
FACILITY INFORMATION		
15. Plant capacity (maximum tons of sugar beets sliced and processed in a 24-hour day)	(tons)	
16. Average recovery rate (tons of refined sugar produced per ton of sugar beets sliced)	(tons)	(tons)
PART II		
17. Specify the names of the persons from whom domestically produced sugar was received:		
a. Raw sugar *(also report on Form CCC-835)*		
b. Refined sugar		
c. Liquid sugar		

PART II, *continued*		ACTUAL WEIGHT	RAW VALUE
d. Molasses	gallons →		

18. Specify the cane sugar refiners and sugar beet processors to whom refined sugar was delivered:	RAW VALUE (CWT)

19. Notes and explanations.

20. Certification: *I hereby certify on behalf of the reporting company identified above that the information provided in this report is true, correct, and complete to the best of my knowledge and belief.*

Reported by:	Date

This program or activity will be conducted on a nondiscriminatory basis without regard to race, color, religion, national origin, age, sex, marital status, or handicap.

ATTACHMENT # 2

Forms Approved - OMB No. 0560-9999

CCC-832
(Proposal 6)

U.S. Department of Agriculture
Agricultural Stabilization and Conservation Service

THIS REPORT REFLECTS DATA FOR THE MONTH OF:

SUGAR PRODUCTION AND DISTRIBUTION REPORT: SUGARCANE PROCESSORS

NOTE: The following statements are made in accordance with the Privacy Act of 1974 (5 USC 552a) and the Paperwork Reduction Act of 1980. The principal authority for requesting the information to be supplied on this form is the Agricultural Adjustment Act of 1938, as amended. The principal information will be used to administer various U.S. sugar programs. This information may be shared with other agencies of the U.S. Department of Agriculture and may be published in composite form. Furnishing the requested information is mandatory; failure to furnish the correct, complete information will result in civil penalties. The provisions of criminal and civil fraud statutes, including 18 USC 286, 287, 371, 651, 1001; 15 USC 714m; and 31 USC 3729, may be applicable to information provided on this form. See 7 CFR Part 1435, Subpart – "Sugar and Crystalline Fructose Information Reporting and Recordkeeping Requirements" for applicable definitions, procedures, requirements, and penalties. Public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Agriculture, Clearance Officer, OIRM, Room 404-W, Washington, D.C. 20250; and to the Office of Management and Budget, Paperwork Reduction Project (OMB No. 0560-9999), Washington, D.C. 20503.

FROM: (Enter name of processor)

TO: USDA/ASCS/DAPPD Room 9999-S
PO Box 2415
Washington, DC 20013

FAX NO:

Name and location of the processing facility (mill) providing these data:	QUANTITY Use hundredweight (CWT) unless otherwise noted.	
PART I **BEGINNING STOCKS OF SUGAR** *(inventories at the beginning of the month)*	**ACTUAL WEIGHT**	**RAW VALUE**
1. Beginning stocks of sugar *(including sugar held in custody by U.S. Customs Service)*		
a. Raw sugar		
b. Refined sugar		
c. Liquid sugar		
d. Molasses gallons→		
RECEIPTS OF RAW MATERIALS		
2. Receipts of sugarcane *(net short tons)*		
a. Domestically produced sugarcane		
b. Imported sugarcane		
3. Receipts of domestically produced sugar, including damaged refined sugar		
4. Receipts of imported sugar		
PROCESSING INPUTS *(raw materials used in processing)*		
5. Sugarcane ground *(net short tons)*		
6. Molasses processed gallons→		
7. Refined sugar *processed (including damaged refined sugar)*		
8. Liquid sugar processed		

CCC-832 (Page 2)

PRODUCTION *(output of sugar)* 9. Sugar production	QUANTITY Use hundredweight (CWT) unless otherwise noted. ACTUAL WEIGHT	RAW VALUE
a. Raw sugar		
(i) For further processing		
(ii) For direct consumption		
b. Liquid sugar		
c. Molasses Enter total here in gallons→		
(i) Edible molasses		
(ii) Inedible molasses		
(iii) Desugaring molasses		
DISTRIBUTION OF SUGAR *(i.e., the sale or other disposition of sugar in commerce)*		
10. Raw sugar		
a. Distributed to cane sugar refiners and sugar beet processors *(specify to whom in Part II)*		
b. Forfeited to the Commodity Credit Corporation (CCC)		
c. Distributed for the production of alcohol *(including alcoholic beverages, ethanol, and polyhydric alcohol)*		
d. Distributed for the production of animal feed *(including feed for livestock and pets)*		
e. Distributed for exportation from the customs territory of the United States		
f. Distributed to Puerto Rico		
g. Distributed for direct consumption *(also report on form CCC-834)*		
h. All other distributions *(also report on form CCC-834)*		
11. Liquid sugar		
12. Molasses Enter total here in gallons→		
a. Edible molasses		
b. Inedible molasses		
c. Desugaring molasses		
ENDING STOCKS OF SUGAR *(inventories at end of month)*		
13. Inventory adjustments *(indicate gain or loss)*		
14. Ending stocks		
a. Raw sugar		
b. Refined sugar		
c. Liquid sugar		
d. Molasses gallons→		

CCC-832 (Page 3)

FACILITY INFORMATION	QUANTITY Use hundredweight (CWT) unless otherwise noted.	
	ACTUAL WEIGHT	RAW VALUE
15. Plant capacity *(maximum net tons of sugarcane ground and processed in a 24-hour day)*	(tons)	
16. Average recovery rate *(tons of sugar produced per ton of sugarcane processed)*	*(tons)*	*(tons)*
PART II		
17. Specify the cane sugar refiners and sugar beet processors to whom raw sugar was delivered:		

18. Notes and Explanations

19. Certification: *I hereby certify on behalf of the reporting company identified above that the information provided in this report is true, correct, and complete to the best of my knowledge and belief.*	
Reported by:	Date

This program or activity will be conducted on a nondiscriminatory basis without regard to race, color, religion, national origin, age, sex, marital status, or handicap.

ATTACHMENT # 3

Form Approved OMB No. 0560-9999

CCC-833
(Proposal 5)

U.S. Department of Agriculture
Agricultural Stabilization and Conservation Service

THIS REPORT RELECTS DATA FOR THE MONTH OF:

SUGAR PRODUCTION AND DISTRIBUTION REPORT: SUGAR DISTRIBUTIONS (DELIVERIES)

IMPORTANT: SEE INSTRUCTIONS ON REVERSE SIDE BEFORE COMPLETING THIS FORM.

FROM: (Enter name of refiner)

TO: USDA/ASCS/DAPPD Room 9999-S
PO Box 2415
Washington, DC 20013

FAX NO:

REPORTING COMPANY: (Enter name, address, and telephone no.)

DISTRIBUTION BY PRODUCT OR BUSINESS OF BUYER (exclude raw sugar and molasses)	NEW ENGLAND	MIDDLE ATLANTIC	NORTH CENTRAL	SOUTH	WEST	PUERTO RICO	TOTAL UNITED STATES	
	TOTAL DELIVERY (CWT.)	TOTAL DELIVERY (CWT.)	TOTAL DELIVERY (CWT.)	TOTAL DELIVERY (CWT.)	TOTAL DELIVERY (CWT.)	TOTAL DELIVERY (CWT.)	TOTAL DELIVERY (CWT.)	LIQUID (CWT. SUGAR SOLIDS)
1. Bakery and allied products, cereals and cereal products								
2. Confectionery and related products								
3. Ice cream and dairy products								
4. Beverages								
5. Canned, bottled and frozen foods, jams, jellies, preserves, etc.								
6. Multiple and all other food uses								
7. Non-food uses								
8. Hotels, restaurants, institutions								
9. Wholesale grocers, jobbers, sugar dealers								
10. Retail grocers, chain stores, supermarkets								
11. Distributions (deliveries) to government agencies								
12. All other distributions (deliveries)								
13. TOTAL DISTRIBUTIONS (DELIVERIES)								
DISTRIBUTIONS BY TYPE OF SUGAR (report in raw value basis)								
14. Refined sugar								
15. Liquid sugar								
16. Raw sugar								
17. Edible molasses Gallons →								
DISTRIBUTIONS BY TYPE OF DELIVERY (report in raw value basis)								
18. Deliveries in consumer-size packages (less than 50 pounds)								
19. Deliveries in bulk (unpackaged)								

I hereby certify on behalf of the reporting company identified above that the information provided in this report is true, correct, and complete to the best of my knowledge and belief.

Reported by:

Date:

This program or activity will be conducted on a nondiscriminatory basis without regard to race, color, religion, national origin, age, sex, marital status, or handicap.

CCC-833 (Proposal 5) Reverse

WHEN AND WHERE TO SUBMIT REPORTS

WHAT TO REPORT

General instructions:

Show the quantities of sugar delivered for direct consumption during the calendar month.

Report deliveries on a refined weight basis for the same sugar as reported on the appropriate production and marketing report (Form ASCS-841, ASCS-842, or ASCS-844 as applicable) in hundredweight, except for liquid sugar which should be reported on the basis of sugar solids content.

Report quantities of direct consumption sugar delivered for the account of other primary distributors in items 1 through 12. Such quantities should be reported as delivered to the localities in which delivery was made by you. Exclude quantities of direct consumption sugar delivered for your account by other primary distributors.

GEOGRAPHICAL AREAS

In breaking down or grouping deliveries by areas, use the following classification of States to determine areas:

New England States - include Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut.
Middle Atlantic States - include New York, New Jersey, and Pennsylvania.
North Central States - include Ohio, Indiana, Illinois, Michigan, Wisconsin, Minnesota, Iowa, Missouri, North Dakota, South Dakota, Nebraska, and Kansas.
Soutern States - include Delaware, Maryland, District of Columbia, Virginia, West Virginia, North Carolina, South Carolina, Georgia, Florida, Kentucky, Tennessee, Alabama, Mississippi, Arkansas, Louisiana, Oklahoma, and Texas.
Western States - include Alaska, Hawaii, Montana, Idaho, Wyoming, Colorado, New Mexico, Arizona, Utah, Nevada, Washington, Oregon, and California.
Puerto Rico - enter separately and include in U.S. total.

CLASSIFICATION BY TYPE OF PRODUCT OR BUSINESS OF BUYER

In completing items 1-7, 14, and 15, use the following classification of products:

1. **BAKERY AND ALLIED PRODUCTS**: Bread, rolls, sweet goods, dessert preparations, doughnuts, biscuits, crackers, cookies, pretzels, crullers, baking mixes, and batters, bakers' supply house, breakfast and other prepared cereals and cereal paste products. When possible to distinguish between deliveries to bakers' and confectioners' supply houses, include deliveries for the company in the category which you believe to be the most important.

2. **CONFECTIONERY AND RELATED PRODUCTS**: Candy, candied fruits, and other confectionery products, chocolate and cocoa products, chewing gum, confectioners' supply houses. When impossible to distinguish between deliveries to bakers' and confectioners' supply houses, include deliveries for the company in the category which you believe to be the most important.

3. **ICE CREAM AND DAIRY PRODUCTS**: Ice cream, ice milk mix, ices, sherbets, frozen custard, sweetened condensed milk (bulk and case goods), creamery butter, cheese and cheese spreads, chocolate milk, miscellaneous dairy products.

4. **BEVERAGES**: Alcoholic and non-alcoholic beverages, drink mixes, fountain syrups, flavoring and coloring extracts.

5. **CANNED, BOTTLED, AND FROZEN FOODS, JAMS, JELLIES, PRESERVES, etc.**: Canned, bottled and frozen foods, jams, jellies, preserves and dried fruit, vegetables, fruit juices, soups, soup mixes, baked beans, pickled fruits and vegetables, relishes, vegetable sauces, and seasoning, marmalades, fruit butters, mayonnaise, and condiments.

6. **MULTIPLE AND ALL OTHER FOOD USES**: Deliveries to buyers making products falling into two or more of the above categories and for which estimates of amounts going into each category are not feasible. Also, deliveries for miscellaneous food uses, such as meat curing, syrup blending, etc.

7. **NON-FOOD USES**: All non-food uses, such as tobacco, pharmaceutical, etc.

18. **CONSUMER - SIZE PACKAGES**: For the United States and for each region, report deliveries in packages of less than 50 pounds, but excluding deliveries made in such packages to hotels, restaurants, and institutions. Report this item in the same units as used for the other items; i.e., in terms of hundredweights.

19. **BULK DELIVERIES**: For the United States and for each region report deliveries of bulk sugar. Report this item in the same unit as used for other items; i.e., in terms of hundredweight.

NOTE: The following statements are made in accordance with the Privacy Act of 1974 (5 USC 552a) and the Paperwork Reduction Act of 1980. The authority for requesting the information to be supplied on this form is the Agricultural Adjustment Act of 1938, as amended. The principal information will be used to administer various U.S. Sugar Programs. The information may be shared with other agencies of the U.S. Department of Agriculture and and may be published in composite form. Furnishing the requested information is mandatory; however, failure to furnish the correct, complete information will result in civil penalties. The provisions of criminal and civil fraud statutes, including 18 USC 286, 287, 371, 651, 1001; 15 USC 714m; and 31 USC 3729, may be applicable to information provided on this form. See 7 CFR Part 1435, Subpart – "Sugar and Crystalline Fructose Information Reporting and Recordkeeping Requirements" for applicable definitions, procedures, requirements, and penalties. Public reporting burden for this collection of information is estimated to average 2 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Agriculture, Clearance Officer, OIRM, Room 404-W, Washington, D.C. 20250; and to the Office of Management and Budget, Paperwork Reduction Project (OMB No. 0560-9999), Washington, D.C. 20503.

ATTACHMENT # 4

Form Approved - OMB No. 0560-9999

CCC-834 (Proposal 6)	**U.S. Department of Agriculture** Agricultural Stabilization and Conservation Service **SUGAR PRODUCTION AND DISTRIBUTION REPORT: MANUFACTURERS OF CRYSTALLINE FRUCTOSE**	THIS REPORT REFLECTS DATA FOR THE MONTH OF:

NOTE: The following statements are made in accordance with the Privacy Act of 1974 (5 USC 552a) and the Paperwork Reduction Act of 1980. The principal authority for requesting the information to be supplied on this form is the Agricultural Adjustment Act of 1938, as amended. The principal information will be used to administer various U.S. sugar programs. This information may be shared with other agencies of the U.S. Department of Agriculture and may be published in composite form. Furnishing the requested information is mandatory, failure to furnish the correct, complete information will result in civil penalties. The provisions of criminal and civil fraud statutes, including 18 USC 286, 287, 371, 651, 1001; 15 USC 714m; and 31 USC 3729, may be applicable to information provided on this form. See 7 CFR Part 1435, Subpart -- "Sugar and Crystalline Fructose Information Reporting and Recordkeeping Requirements" for applicable definitions, procedures, requirements, and penalties. Public reporting burden for this collection of information is estimated to average 15 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Agriculture, Clearance Officer, OIRM, Room 404-W, Washington, D.C. 20250; and to the Office of Management and Budget, Paperwork Reduction Project (OMB No. 0560-9999), Washington, D.C. 20503.

IMPORTANT: SEE INSTRUCTIONS ON REVERSE SIDE BEFORE COMPLETING THIS FORM.

FROM: (Enter name of refiner)	**TO:** USDA/ASCS/DAPPD Room 9999-S PO Box 2415 Washington, DC 20013 FAX NO:	**REPORTING COMPANY:** (Enter name, address, and telephone no.)

PART I	**TOTAL UNITED STATES** (Includes Puerto Rico)
STOCKS OF CRYSTALLINE FRUCTOSE (Inventories)	DELIVERY (CWT.)
1. Beginning stocks (stocks on hand at the beginning of the month)	
2. Ending stock (stocks on hand at the end of the month)	
IMPORTS AND EXPORTS OF CRYSTALLINE FRUCTOSE	
3. Imports	
4. Exports	
DOMESTIC DISTRIBUTION OF CRYSTALLINE FRUCTOSE *(i.e., the sale or other disposition of sugar in commerce in the United States, including Puerto Rico)*	
5. Total domestic distributions *(complete Part II, and enter total from item 18)*	
PART II - DISTRIBUTIONS BY PRODUCT OR BUSINESS OF BUYER	
6. Bakery and allied products, cereals and cereal products	
7. Confectionery and related products	
8. Ice cream and dairy products	
9. Beverages	
10. Canned, bottled and frozen foods, jams, jellies, preserves, etc.	
11. Multiple and all other food uses	
12. Non-food uses	
13. Hotels, restaurants, institutions	
14. Wholesale grocers, jobbers, sugar dealers	
15. Retail grocers, chain stores, supermarkets	
16. Distributions to government agencies	
17. All other distributions	
18. **TOTAL DELIVERIES** *(total of items 6 through 17. Enter here and in item 5.)*	

19. **Certification:** *I hereby certify on behalf of the reporting company identified above that the information provided in this report is true, correct, and complete to the best of my knowledge and belief.*

Reported By:	Date:

CCC-834 (Reverse)

CLASSIFICATION BY TYPE OF PRODUCT OR BUSINESS OF BUYER

In completing lines 1-12, use the following classifications of products:

1. **BAKERY AND ALLIED PRODUCTS:** Bread, rolls, sweet goods, dessert preparations, doughnuts, biscuits, crackers, cookies, pretzels, crullers, baking mixes and batters, bakers' supply house, breakfast and other prepared cereals and cereal paste products. When impossible to distinguish between deliveries to bakers' and confectioner's supply houses, include deliveries for the company in the category which you believe to be the more important.

2. **CONFECTIONERY AND RELATED PRODUCTS:** Candy, candied fruits, and other confectionery products, chocolate and cocoa products, chewing gum, confectioners' supply houses. When impossible to distinguish between deliveries to bakers' and confectioners' supply houses, include deliveries for the company in the category which you believe to be the more important.

3. **ICE CREAM AND DAIRY PRODUCTS:** Ice cream, ice cream mix, ices, sherbets, frozen custard, sweetened condensed milk (bulk and case goods), creamery butter, cheese and cheese spreads, chocolate milk, miscellaneous dairy products.

4. **BEVERAGES:** Alcholic and non-alcoholic beverages, drink mixes, fountain syrups, flavoring and coloring extracts.

5. **CANNED, BOTTLED AND FROZEN FOODS, JAMS, JELLIES, PRESERVES, etc.:** Canned, bottled and frozen foods, jams, jellies, preserves and dried fruit, vegetables, fruit juices, vegetable juices, soups, soup mixes, baked beans, pickled fruits and vegetables, relishes, vegetable sauces, and seasoning, marmalades, fruit butters, mayonnaise, and condiments.

6. **MULTIPLE AND ALL OTHER FOOD USES:** Deliveries to buyers making products falling into two or more of the above categories and for which estimates of amounts going into each category are not feasible. Also, deliveries for miscellaneous food uses, such as meat curing, syrup blending, etc.

7. **NON-FOOD USES:** All non-food uses, such as tobacco, pharmaceutical, etc.

This pro‸ıam or activity w ›e cor ‹cte on a nondiscriminatory basis without regard to race, color, religion, national origin, age, sex, marita sta‸ıs, or handicap.

ATTACHMENT # 5

Form Approved - OMB No. 0560-9999

CCC-835 (Proposal 5)	U.S. Department of Agriculture Agricultural Stabilization and Conservation Service **SUGAR PRODUCTION AND DISTRIBUTION REPORT: CANE SUGAR REFINERS**	THIS REPORT REFLECTS DATA FOR:	
		Month	Year

NOTE: The following statements are made in accordance with the Privacy Act of 1974 (5 USC 552a) and the Paperwork Reduction Act of 1980. The principal authority for requesting the information to be supplied on this form is the Agricultural Adjustment Act of 1938, as amended. The information will be used to administer various U.S. sugar programs. This information may be shared with other agencies of the U.S. Department of Agriculture and may be published in composite form. Furnishing the requested information is mandatory; failure to furnish the correct, complete information will result in civil penalties. The provisions of criminal and civil fraud statutes, including 18 USC 286, 287, 371, 651, 1001; 15 USC 714m; and 31 USC 3729, may be applicable to information provided on this form. See 7 CFR Part 1435, Subpart – "Sugar and Crystalline Fructose Information Reporting and Recordkeeping Requirements" for applicable definitions, procedures, requirements, and penalties. Public reporting burden for this collection of information is estimated to average 60 minutes per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Department of Agriculture, Clearance Officer, OIRM, Room 404-W, Washington, D.C. 20250; and to the Office of Management and Budget, Paperwork Reduction Project (OMB No. 0560-9999), Washington, D.C. 20503.

FROM: *(Enter name, address, and telephone number of refining company)*	**TO:** USDA/ASCS/DAPPD Room 9999-S PO Box 2415 Washington, DC 20013 FAX NO:

Name and location of refining facility providing these data:	**QUANTITY** Use hundredweight *(CWT)* unless otherwise noted.	
PART I	**ACTUAL WEIGHT**	**RAW VALUE**
BEGINNING STOCKS OF SUGAR *(inventories at the beginning of the month)*		
1. Beginning stocks of sugar *(including sugar held in custody by U.S. Customs Service)*		
a. Raw sugar		
b. Refined sugar		
c. Liquid sugar		
d. Molasses gallons →		
RECEIPTS OF RAW MATERIALS		
2. Receipts of domestically produced sugar *(specify from whom in Part II)*		
a. Raw sugar		
b. Refined sugar Enter total here →		
(i) Purchased damaged refined sugar		
(ii) Other		
c. Liquid sugar		

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	QUANTITY Use hundredweight *(CWT)* unless otherwise noted.	
PART I *(Continued)*	ACTUAL WEIGHT	RAW VALUE
d. Molasses — Enter total here in gallons →		
(i) For desugaring		
(ii) Other		
3. Receipts of imported sugar *(specify countries of origin in Part II)*		
a. Raw sugar		
b. Refined sugar		
c. Liquid sugar		
d. Molasses — gallons →		
PROCESSING INPUTS *(raw materials used in processing)*		
4. Raw sugar put into refining process *(melt)*		
5. Refined sugar put into refining process — Enter total here →		
a. Damaged refined sugar from your own production remelted		
b. Purchased damaged refined sugar remelted		
c. Other		
6. Liquid sugar put into refining process		
7. Molasses put into refining process — gallons →		
PRODUCTION *(output of sugar)*		
8. Sugar production		
a. Refined sugar — Enter total here →		
(i) From raw, refined, or liquid sugar		
(ii) From molasses desugaring		

CCC-835 *(Page 3)*

PART I *(Continued)*	QUANTITY Use hundredweight *(CWT)* unless otherwise noted. ACTUAL WEIGHT	RAW VALUE
b. Liquid sugar — Enter total here →		
(i) From raw, refined, or liquid sugar		
(ii) From molasses desugaring		
c. Molasses — Enter total here in gallons →		
(i) Edible molasses		
(ii) Inedible molasses		
DISTRIBUTION OF SUGAR *(i.e., the sale or other disposition of sugar in commerce)*		
9. Distribution of raw sugar — Enter total here →		
a. Distributions to other cane sugar refiners or to sugar beet processors *(also complete item 21)*		
b. Distributed for the production of alcohol *(including alcoholic beverages, ethanol, and polyhydric alcohol)*		
c. Distributed for the production of animal feed *(including feed for livestock and pets)*		
d. Distributed for exportation from the customs territory of the United States		
e. Distributions for direct consumption *(report on Form CCC-833)*		
f. All other distributions		
10. Distributions of refined sugar — Enter total here →		
a. Distributed to cane sugar refiners and sugar beet processors *(specify to whom in Part II)*		
b. Distributed for the production of alcohol *(including alcoholic beverages, ethanol, and polydydric alcohol)*		
(i) Transferred to a licensed manufacturer under the Foreign Agricultural Service's program for sugar imported for the Production of Polyhydric Alcohol		
(ii) Other		
c. Distributed for the production of animal feed *(including feed for livestock and pets)*		
d. Distributed for exportation from the customs territory of the United States		
(i) Under the Foreign Agricultural Service's Refined Sugar Re-export Program		

CCC-835 *(Page 4)*

	QUANTITY Use hundredweight *(CWT)* unless otherwise noted.	
PART I *(Continued)*	ACTUAL WEIGHT	RAW VALUE
(ii) Other		
e. Transferred to a licensed manufacturer under the Foreign Agricultural Service's Sugar-Containing Products Re-export Program		
f. All other distributions *(report on Form CCC-833)*		
11. Liquid sugar — Enter total here →		
a. Domestic distributions		
(i) For direct consumption *(report on Form CCC-833)*		
(ii) Other		
b. Distributed for exportation from the customs territory of the United States		
(i) Under the Foreign Agricultural Service's Refined Sugar Re-export Program		
(ii) Other		
12. Molasses — Enter total here in gallons →		
a. Domestic distributions		
(i) For direct consumption *(report on Form CCC-833)*		
(ii) Other		
b. Distributed for exportation from the customs territory of the United States		
ENDING STOCKS OF SUGAR *(inventories at end of month)*		
13. Inventory adjustments *(indicate gain or loss)*		
14. Ending stocks		
a. Raw sugar		
b. Refined sugar		
c. Liquid sugar		
d. Molasses — gallons →		
FACILITY INFORMATION		
15. Plant capacity *(maximum tons of raw sugar processed in a 24-hour day)*	(tons)	(tons)
16. Average recovery rate *(tons of refined sugar produced per ton of raw sugar processed)*	(tons)	(tons)

CCC-835 *(Page 5)*

PART II

17. Specify from whom **domestically produced raw sugar** was **received** and the quantities: *(include U.S. sugarcane processors, sugar beet processors, or other cane sugar refiners)*

NAME	QUANTITY Use hundredweight *(CWT)* unless otherwise noted.	
	ACTUAL WEIGHT	RAW VALUE

CCC-835 *(Page 6)*

PART II *(Continued)*

18. Specify the names of the persons from whom **damaged refined sugar was received** and the quantities:

NAME	QUANTITY Use hundredweight *(CWT)* unless otherwise noted.	
	ACTUAL WEIGHT	RAW VALUE

19. Specify the names of the persons from whom **liquid sugar or molasses was received** by the type and quantity:

NAME	SPECIFY IF LIQUID SUGAR OR MOLASSES	QUANTITY Use hundredweight *(CWT)* for liquid sugar and gallons for molasses.	
		ACTUAL WEIGHT	RAW VALUE

CCC-835 *(Page 7)*

PART II *(Continued)*

20. Specify the country of origin from which **imported raw sugar** was received and the quantities:

COUNTRY OF ORIGIN	QUANTITY Use hundredweight *(CWT)* unless otherwise noted.	
	ACTUAL WEIGHT	RAW VALUE

CCC-835 *(Page 8)*

PART II *(Continued)*

21. Specify other cane sugar refiners and sugar beet processors to whom **refined sugar** was **delivered** or on whose account the refined sugar was delivered to a sugar user:

NAME	QUANTITY Use hundredweight *(CWT)* unless otherwise noted.	
	ACTUAL WEIGHT	RAW VALUE

22. Notes and explanations *(Use attachment if necessary)*

23. Certification *I hereby certify on behalf of the reporting company identified above that the information provided in this report is true, correct, and complete to the best of my knowledge and belief.*

Reported by:	Date:

This program or activity will be conducted on a nondiscriminatory basis without regard to race, color, religion, national origin, age, sex, marital status, or handicap.

BILLING CODE 3410-05-C

Signed September 13, 1991 in Washington, DC.

Keith D. Bjerke,

Executive Vice President, Commodity Credit Corporation.

[FR Doc. 91–22477 Filed 9–18–91; 8:45 am]

BILLING CODE 3410-05-M

Farmers Home Administration

7 CFR Parts 1930 and 1944

Multi-Family Housing—Corrections

AGENCY: Farmers Home Administration, USDA.

ACTION: Final rule; correction.

SUMMARY: The Farmers Home Administration (FmHA) corrects errors on final rule published on January 22, 1991, (56 FR 2198). The intended effect of this action is to correct errors and omissions in the final rule.

EFFECTIVE DATE: September 19, 1991.

FOR FURTHER INFORMATION CONTACT: Cynthia Reese-Foxworth, Loan Assistant, Multi-Family Housing Processing Division, room 5347–S, telephone (202) 382–1940. The address is: USDA–FmHA, South Agriculture Building, 14th and Independence Aves., SW., Washington, DC 20250.

SUPPLEMENTARY INFORMATION: See the rulemaking action published on January 22, 1991, (56 FR 2198). FmHA Instruction 1930–C, "Management and Supervision of Multiple Family Housing Borrowers and Grant Recipients", and FmHA Instruction 1944–E, "Section 515 Rural Rental and Rural Cooperative Housing Loan Policies, Procedures, and Authorizations", are herein revised to correct typographical errors, references, and omissions.

Therefore, chapter XVIII, title 7, Code of Federal Regulations is amended as follows:

PART 1930—GENERAL

1. The authority citation for part 1930 continues to read as follows:

Authority: 42 U.S.C. 1480; 7 CFR 2.23; 7 CFR 2.70.

Subpart C—Management and Supervision of Multiple Family Housing Borrowers and Grant Recipients

2. In Exhibit B, paragraph II C 2 b is corrected by changing the phrase "member of or co-member" to "member or co-member"

3. In Exhibit B, the last sentence of paragraph II J is corrected to read as follows:

Exhibit B to Subpart C—Multiple Family Housing Management Handbook

* * * * *

II. * * *

J. * * * (To receive an elderly family deduction, the elderly, disabled or handicapped person must be the tenant, co-tenant, member or co-member.)

* * * * *

4. Exhibit B, paragraph II UU, is corrected by changing the title of HUD Form 50059 from "Certification and Recertification of Tenant Eligibility" to "Certification of Tenant Eligibility".

5. In paragraph V A, the introductory text is corrected by changing the reference from "1989" to "1980".

6. Paragraph V D 1 b (7), is corrected to read as follows:

V. MANAGEMENT OPERATIONS:

D. * * *

1. * * *

b. * * *

(7) Management agent's office overhead including office space and utilities, clerical staff and training, agent's office bookkeeping, office supplies and equipment, transportation and telephone calls to projects, office data processing systems and postage.

* * * * *

7. In paragraph VI, the chart following subparagraph B 2 a is corrected to read as follows:

VI. *Renting Procedures*

* * * * *

B. * * *

2. * * *

a. * * *

No. bedrooms	Occupants	
	Min	Max
0	1	2
1	1	2
2	2	4
3	4	6
4	6	8
5	8	10

* * * * *

8. Paragraph VI D 1 b is corrected by changing "no sufficient applications" to read "sufficient applications".

9. Paragraphs VI D 2 e (2) and VI D 4 d (1), are corrected by changing "marital" to read "familial".

10. The introductory text of paragraph VIII B 3 is corrected by changing "full project" to read "full profit".

11. The introductory text of paragraph XIII B 2 a (1) is corrected to read as follows:

XIII. *Accounting and Reporting Requirements and Financial Management Analysis:*

* * * * *

B. * * *

2. * * *

a. * * *

(1) *Initial Operating Capital.* The initial operating capital may be in the form of cash, an irrevocable letter of credit, or in a combination of the two as set forth in § 1944.211(a)(6) of subpart E of part 1944 of this chapter. The borrower will have deposited any initial operating cash into this temporary bookkeeping account by the time of the FmHA loan closing or when interim financing funds are obtained, whichever occurs first. The initial operating cash will be deposited in the General Operating Account. Any letters of credit will be supplied by the time of the FmHA loan closing or when interim financing funds are obtained, whichever occurs first. Letters of Credit will be maintained in the casefile. They must be renewed as needed so that a current Letter of Credit is always in effect. If a borrower does not renew the Letter of Credit they will be required to deposit an equivalent amount of cash into the General Operating Account before the Letter of Credit expires. If a borrower supplied all or part of the initial operating capital in the form of a Letter of Credit and the borrower makes cash deposits into the General Operating Account for operating purposes the borrower can provide the District Office with a new Letter of Credit in a smaller amount with evidence of the cash deposit. The new Letter of Credit and the cash deposit must total the required initial operating capital. The old Letter of Credit will be returned to the borrower. After two, but before five full borrower fiscal years of operation, the State Director may authorize the borrower to make a onetime withdrawal of the initial operating capital, or a part of it. The withdrawal can be in the form of cash, release or reduction in the Letter of Credit, or a combination of both. The total withdrawal can never exceed the initial operating capital as described in the loan agreement or loan resolution. The withdrawal can be approved provided that:

* * * * *

12. In Exhibit C–2, the second sentence of the first paragraph that has a single asterisk is corrected by changing the word "unusual" is to read "usual".

PART 1944—HOUSING

13. The authority citation for part 1944 continues to read as follows:

Authority: 42 U.S.C. 301; 7 CFR 2.23; 7 CFR 2.70

Subpart E—Section 515 Rural Rental and Rural Cooperative Housing Loan Policies, Procedures, and Authorizations

14. Section 1944.205 is corrected by adding alphabetically the definitions of *Rural area* and *State agency* to read as follows:

§ 1944.205 Definitions.

* * * * *

Rural area. Open country or rural places as defined in § 1944.10 of subpart A of part 1944 of this chapter.

* * * * *

State agency. This is the Housing Finance Agency within a State that has been given the responsibility to allocate low-income tax credits.

* * * * *

15. Exhibit A, paragraph IV B 3 d, is corrected by changing the reference "1944.215(h)" to read "1944.215(g).

Dated: August 20, 1991.

La Verne Ausman,

Administrator, Farmers Home Administration.

[FR Doc. 91-22465 Filed 9-18-91; 8:45 am]

BILLING CODE 3410-07-M

DEPARTMENT OF TRANSPORTATION

Federal Aviation Administration

14 CFR Part 39

[Docket No. 90-ASW-35, Amdt. 39-8034; AD 90-13-01R1]

Airworthiness Directives; Bell Helicopter Textron, Inc. (BHTI), Model 206B, 206L, 206L-1, and 206L-3 Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule.

SUMMARY: This action publishes in the Federal Register and makes effective as to all persons an amendment adopting an airworthiness directive (AD), which was previously made effective as to all known U.S. owners and operators of certain Bell Helicopter Textron, Inc. (BHTI), Model 206B, 206L, 206L-1, and 206L-3 helicopters by individual priority letters. The AD requires an inspection and, if certain serial numbered tail rotor blade assemblies are present, replacement of the affected assemblies. The AD is necessary to prevent failure of the tail rotor blade assembly and loss of tail rotor control.

DATES: Effective October 17, 1991, as to all persons except those persons to whom it was made immediately effective by Priority Letter AD's 90-13-01 and 90-13-01R1 issued June 14 and June 22, 1990, respectively, which contained this amendment.

ADDRESSES: Applicable AD-related material may be examined at the Rules Docket, Office of the Assistant Chief Counsel, FAA, 4400 Blue Mound Road, room 158, Building 3B, Fort Worth, Texas.

FOR FURTHER INFORMATION CONTACT: Ms. Michelle M. Corning, Rotorcraft Directorate, Rotorcraft Certification Office, ASW-170, FAA, Southwest Region, Forth Worth, Texas 76193-0170, telephone (817) 624-5126, fax (817) 624-5988.

SUPPLEMENTARY INFORMATION: On June 14 and June 22, 1990, Priority Letter AD's 90-13-01 and 90-13-01R1, respectively, were issued and made effective immediately as to all known U.S. owners and operators of certain Bell Helicopter Textron, Inc., Model 206B, 206L, 206L-1, and 206L-3 helicopters. The FAA determined that 24 tail rotor blade assemblies, part numbers (P/N's) 206-016-201-113 and 206-016-201-127, which had previously been removed from service after reaching their life limits, may have been installed on U.S. type certificated helicopters. These assemblies may be represented as airworthy by designating them as newly overhauled assemblies by the use of falsified records. The AD's were prompted by an investigation of the records for certain critical helicopter flight components, which include these 24 tail; rotor blade assemblies. The FAA has documentation that shows the tail rotor blade assemblies have exceeded their approved life limit of 2,400 hours' time in service. The current location of all the affected assemblies cannot be determined by the FAA. The last location of record for the assemblies was Duschak Helicopter International of Torrance, California. The Ad's require an inspection of tail rotor blades assemblies of the affected helicopters. If the tail rotor blade assembly installed is P/N's 206-016-201-113 or 206-016-201-127 and if the serial number installed is listed in the body of the AD's, the tail rotor blade assembly is to be removed and replaced with an airworthy part before further flight. The revision R1 was necessary to make the AD applicable to the Model 206B helicopter and to add "unless already accomplished" to the compliance statement in the AD text. The technical portion of the AD was not changed by revision R1.

Since it was found that immediate corrective action was required, notice and public procedure thereon were impracticable and contrary to the public interest, and good cause existed to make the AD's effective immediately by individual letters issued June 14 and June 22, 1990, to all known U.S. owners and operators of certain Bell Helicopter Textron, Inc. Model 206B, 206L, 206L-1 and 206L-3 helicopters. These conditions still exist, and the AD is hereby published in the Federal Register as an amendment to § 39.13 of Part 39 of the Federal Aviation Regulations to make it effective as to all persons.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation and that it is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Executive Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures

(44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket (otherwise, an evaluation is not required). A copy of it, if filed, may be obtained by contacting the Rules Docket at the location provided under the caption "**ADDRESSES.**"

List of Subjects in 14 CFR Part 39

Air Transportation, Aircraft, Aviation safety, and Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new AD:

AD 90–13–01R1 **Bell Helicopter Textron, Inc. (BHTI):** Amendment 39–8034. Docket No. 90–ASW–35.

Applicability: Model 206B, 206L, 206L–1, and 206L–3 helicopters, all serial numbers, certificated in any category.

Compliance: Required before further flight, unless already accomplished.

To prevent failure of a tail rotor blade assembly, which could result in loss of control of the tail rotor, accomplish the following:

(a) Determine the part number and serial number of the tail rotor blade assembly installed on the helicopter.

(b) If the tail rotor blade assembly installed is P/N 206–016–201–113 or P/N 206–016–201–127 and is identified with any serial number listed below, remove and replace the blade assembly with an airworthy part before further flight:

Serial Numbers:

T–41361, T–41627, T–41725, T–41737, T–42088, T–42127, T–42157, T–42307, T–42311, T–42316, T–42494, T–42496, T–42497, T–42502, T–42523, T–42534, T–43276, T–44089, T–44120, T–44157, T–44174, T–44222, T–44300, T–44638

(c) If one of the tail rotor blade assemblies listed in paragraph (b) is found, report the helicopter registration, serial number, and tail rotor blade assembly serial number to the Manager, Rotorcraft Certification Office, ASW–170, Federal Aviation Administration, Fort Worth, Texas, 76193–0170, telephone (817) 624–5170, within 10 days of the inspection. (Reporting approved by the Office of Management and Budget under OMB No. 2120–0056.)

(d) In accordance with FAR §§ 21.197 and 21.199, the helicopter may be flown to a base where the tail rotor blade assembly replacement may be accomplished.

Note: Any unairworthy blade assemblies found as a result of paragraph (b) of this AD should be permanently marked as unairworthy.

(e) Record compliance with paragraph (b) of this AD in the AD compliance record and in the maintenance record of the helicopter log book. This record must include the serial numbers of any deficient blade assembly found during compliance with this AD.

(f) An alternate method of compliance which provides an equivalent level of safety, may be used if approved by the Manager, Rotorcraft Certification Officer, Southwest Region, Federal Aviation Administration, Fort Worth, Texas 76193–0170, telephone (817) 624–5170.

This amendment (39–8034, AD 90–13–01R1) becomes effective October 17, 1991, as to all persons except those persons to whom it was made immediately effective by Priority Letter AD's 90–13–01 and 90–13–01R1, issued June 14 and June 22, 1990, which contained this amendment.

Issued in Fort Worth, Texas, on August 28, 1991.

Henry A. Armstrong,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 91–22577 Filed 9–18–91; 8:45 am]

BILLING CODE 4910–13–M

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14 CFR Part 39

[Docket No. 90–ASW–09; Amdt. 39–8029; AD 90–03–10]

Airworthiness Directives; Bell Helicopter Textron, Inc., Models 204B, 205A, 205A–1 Helicopters; and Certain Military Model UH–1A, UH–1B, UH–1E, UH–1F, UH–1H, UH–1L, and TH–1L Helicopters

AGENCY: Federal Aviation Administration (FAA) DOT.

ACTION: Final rule.

SUMMARY: This action publishes in the Federal Register and makes effective as to all persons an amendment adopting an airworthiness directive (AD) which was previously made effective as to all known U.S. owners and operators of certain Bell Helicopter Textron, Inc., Models 204B, 205A, 205A–1 helicopters and certain Military Model helicopters by individual priority letter. The AD requires an inspection to determine if the tail rotor grip, part number (P/N) 204–011–728–19, is installed, and if certain serial numbered tail rotor grips are installed, the tail rotor grip must be moved and replaced with an airworthy part before further flight. The AD is necessary to prevent failure of a tail rotor grip and loss of tail rotor control.

DATES: Effective October 18, 1991, as to all persons except those persons to whom it was made immediately effective by Priority Letter Ad 90–03–10, issued January 29, 1990, which contained this amendment.

ADDRESSES: Applicable AD related material may be examined at the Rules Docket, Office of the Assistant Chief Counsel, FAA, 4400 Blue Mound Road, room 158, Building 3B, Forth Worth, Texas.

FOR FURTHER INFORMATION CONTACT: Ms. Michelle M. Corning, Rotorcraft Directorate, Rotorcraft Certification Office, ASW–170, FAA, Southwest Region, Forth Worth, Texas 76193–0170, telephone (817) 624–5988.

SUPPLEMENTARY INFORMATION: On January 29, 1990, Priority letter Ad 90–03–10 was issued and made effective immediately as to all known U.S. owners and operators of certain Bell Helicopter Textron, Inc. Models 204B, 205A, 205A–1 helicopters and certain military models. The AD requires an inspection of the affected helicopters to determine if tail rotor grip P/N 204–011–728–19, is installed, and if certain serial numbered tail rotor grips are installed, the tail rotor grip must be removed and replaced with an airworthy part before further flight. The AD is prompted by an investigation of the military records for certain critical helicopter flight components, which include these 11 tail rotor grips. Records received from the U.S. Army indicate that these grips have been scrapped due to the accumulation of time beyond their approved life limits. The FAA previously published AD 88–25–05, Amendment 39–6079 (53 FR 47944, November 29, 1988) which established a life limit on the grips of 300 hours. The FAA has documentation that shows the 11 tail rotor grips have exceeded 300 hours' time in service. The current location of all affected parts cannot be determined by the FAA. The last location of record for the parts is the Camden Corporation of McLean, Virginia. The AD is necessary to prevent failure of a tail rotor grip and loss of tailrotor control.

Since it was found that immediate corrective action was required, notice and public procedure thereon were impracticable and contrary to the public interest, and good cause existed to make the AD effective immediately by individual letters issued January 29, 1990, to all known U.S. owners and operators of certain Bell Helicopter Textron, Inc., Models 204B, 205A, 205A–1, UH–1A, –1E, –1F, –1H, –1L, and TH–1L

helicopters. These conditions still exist, and the AD is hereby published in the **Federal Register** as an amendment to § 39.13 of part 39 of the Federal Aviation Regulations to make it effective as to all persons.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient Federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation and that it is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Executive Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been determined further that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket (otherwise, an evaluation is not required). A copy of it, if filed, may be obtained by contacting the Rules Docket at the location under the caption "**ADDRESSES.**"

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, and Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new AD: AD 90–03–10 Bell Helicopter Textron, Inc. (BHTI); California Department of Forestry; Garlick Helicopters; Hawkins and Powers Aviation; Hercules; International Helicopters, Inc.; Lenair Corporation; Offshore Construction; Oregon Helicopters; Pilot Personnel International; Smith Helicopters; Southern Aero Corporation; Southwest Florida Aviation; and West Coast Fabrications: Amendment 39–6029. Docket No. 90–ASW–09.

Applicability: All Model 204B, 205A, 205A–1, UH–1A, UH–1B, UH–1E, UH–1F, UH–1H, UH–1L, and TH–1L helicopters, certificated in any category, with aluminum tail rotor grips, P/N 204–011–728–19, installed.

Compliance: Required before further flight, unless already accomplished.

To prevent failure of a tail rotor grip, which could result in loss of tail rotor control, accomplish the following:

(a) Determine the part numbers and serial numbers of the tail rotor grips installed on the helicopter.

(b) If the tail rotor grip installed is P/N 204–011–728–19 and is identified with any serial number listed below, remove and replace the grip with an airworthy part before further flight:

Serial Numbers:

A3–66287, A3–66333, A3–66356, A3–66361, A3–66365, A3–66370, A3–66377, A3–67149, A3–67171, A3–67184, A3–67207

(c) In accordance with FAR § § 21.197 and 21.199, the helicopter may be flown to a base where the inspection and grip replacement may be accomplished.

(d) An alternate method of compliance which provides an equivalent level of safety, may be used if approved by the Manager, Rotorcraft Certification Office, Southwest Region, Federal Aviation Administration, Fort Worth, Texas 76193–0170, telephone (817) 624–5170.

This Amendment (39–6029; AD 90–03–10) becomes effective October 18, 1991 as to all persons except those persons to whom it was made immediately effective by priority Letter AD 90–03–10 issued January 29, 1990, which contained this amendment.

Issued in Forth Worth, Texas, on August 26, 1991.

Henry A. Armstrong,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Office.

[FR Doc. 91–22575 Filed 9–18–91; 8:45 am]

BILLING CODE 4910-13-M

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14 CFR Part 39

[Docket No. 91-ASW-13; Amdt. 39-8028; AD 91-19-02]

Airworthiness Directives; Sikorsky Aircraft Model S-76B Helicopters

AGENCY: Federal Aviation Administration (FAA), DOT.

ACTION: Final rule; request for comments.

SUMMARY: This amendment adopts a new airworthiness directive (AD) which requires an initial and repetitive 25-hour interval inspections of the left and right engine input driveshaft assemblies for loose balance weights or cracks This AD is prompted by the report of three Sikorsky Model S–76B driveshaft assemblies developing cracks due to loose balance weights with one driveshaft assembly failing due to the development of these cracks. This condition, if not corrected, could result in failure of an engine driveshaft assembly and subsequent loss of flight capability of the helicopter.

DATES: Effective October 17, 1991.

Comments must be received on or before November 4, 1991.

ADDRESSES: Comments on the amendment may be mailed in duplicate to: Rules Docket, Office of the Assistant Chief Counsel, FAA, 4400 Blue Mound Road, Fort Worth, Texas 76193–0007, or delivered in duplicate to room 158, Building 3B, at the above address.

Comments must be marked: Docket No. 91–ASW–13. Comments may be inspected at the above location between the hours of 8 a.m. and 4:30 p.m., Monday through Friday except federal holidays.

The Applicable AD-related material may be obtained from Sikorsky Aircraft, 6900 Main Street, Stratford, Connecticut 06601–1381.

FOR FURTHER INFORMATION CONTACT: Terry Fahr, Boston Aircraft Certification Office, ANE–153, Engine and Propeller Directorate, Aircraft Certification Service, FAA, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803; telephone (617) 273–7103.

SUPPLEMENTARY INFORMATION: The FAA has determined that the balance weights on S–76B engine-to-transmission driveshaft assembles, part number (P/N) 76361–09202, serial numbers (S/N) A230–00001 thru A230–00152, may become loose as a result of flawed rivet holes. The movement of the loose weights may, in turn, cause cracks emanating from the rivet attachment holes, and result in subsequent failure of the driveshaft assembly. This condition, if not corrected could result in potential loss of power to the rotors of the helicopter with loss of flying capability. Since this condition is likely to exist or develop on other helicopters of the same type design, an AD is being issued which requires an initial and 25-hour interval repetitive inspections of the left and right engine-to-transmission driveshaft assemblies for loose balance weights and cracks in the shaft.

Since a situation exists where a helicopter could lose its flying capability due to a failed engine driveshaft assembly, it is found that notice and public procedure hereon are impracticable, and good cause exists for making this amendment effective in less than 30 days.

Request for Comments

Although this action is a final rule which involves flight safety and, thus, was not preceded by notice and public procedure, comments are invited. Interested persons are invited to comment on this rule by submitting such written data, views, or arguments as they may desire. Communications should identify the regulatory docket number and be submitted in duplicate to the address specified above. All communications received on or before the closing date for comments will be considered by the FAA. The rule may be changed in light of comments received.

Comments are specifically invited on the overall regulatory, economic, environmental, and energy aspects of the rule. All comments submitted will be available, both before and after the closing date for comments, in the Rules Docket, Office of the Assistant Chief Counsel, FAA, room 158, Building 3B, 4400 Blue Mound Road, Fort Worth, Texas, for examination by interested persons. A report summarizing each FAA-public contact, concerned with the substance of the proposed AD, will be filed in the Rules Docket.

Commenters wishing the FAA to acknowledge receipt of their comments submitted in response to this notice must submit a self-addressed, stamped postcard on which the following statement is made: Comments to Docket Number 91–ASW–13. The postcard will be date/time stamped and returned to the commenter.

The regulations adopted herein will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. Therefore, in accordance with Executive Order 12612, it is determined that this final rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

The FAA has determined that this regulation is an emergency regulation that is not considered to be major under Executive Order 12291. It is impracticable for the agency to follow the procedures of Order 12291 with respect to this rule since the rule must be issued immediately to correct an unsafe condition in aircraft. It has been further determined that this action involves an emergency regulation under DOT Regulatory Policies and Procedures (44 FR 11034, February 26, 1979). If it is determined that this emergency regulation otherwise would be significant under DOT Regulatory Policies and Procedures, a final regulatory evaluation will be prepared and placed in the Rules Docket (otherwise, an evaluation is not required). A copy of it, if filed, may be obtained from the Rules Docket.

List of Subjects in 14 CFR Part 39

Air transportation, Aircraft, Aviation safety, Safety.

Adoption of the Amendment

Accordingly, pursuant to the authority delegated to me by the Administrator, the Federal Aviation Administration amends 14 CFR part 39 of the Federal Aviation Regulations as follows:

PART 39—[AMENDED]

1. The authority citation for part 39 continues to read as follows:

Authority: 49 U.S.C. 1354(a), 1421 and 1423; 49 U.S.C. 106(g) (Revised Pub. L. 97–449, January 12, 1983); and 14 CFR 11.89.

§ 39.13 [Amended]

2. Section 39.13 is amended by adding the following new AD:

AD 91–19–02. Sikorsky Aircraft: Amendment 39–8028. Docket No. 91–ASW–13.

Applicability: All Model S–76B helicopters, certificated in any category.

Compliance: Required within the next 25 hours' time in service after the effective date of this AD, and thereafter at intervals not to exceed 25 hours' time in service from the last inspection.

To prevent failure of the left and right engine-to-transmission driveshaft assemblies due to cracks emanating from the balance weight rivet attachment holes which could result in loss of flight capability, accomplish the following:

(a) Inspect the left and right engine-to-transmission driveshaft assemblies, part number (P/N) 76361–09202, serial numbers (S/N) A230–00001 thru A230–00152 inclusive, for loose balance weights. The inspection shall be performed by grasping the balance weights by hand and attempting to move them in both the radial and axial directions. Any movement of the balance weights constitutes looseness.

(b) Visually inspect the area surrounding the balance weights for cracks in the shaft using a 10-power or higher magnification glass.

(c) If any loose balance weight or cracked shaft is found, remove the affected driveshaft assembly and replace with an airworthy assembly prior to further flight.

(d) If neither a loose balance weight nor cracked shaft is found, repeat the inspections as prescribed.

(e) The helicopter may be ferried in accordance with the provisions of FAR 21.197 and 21.199 to a base where the AD can be accomplished.

(f) Upon submission of substantiating data by an owner or operator through an appropriate FAA Inspector, an alternate method of compliance or adjustment of the compliance times, which provides an equivalent level of safety, may be used if approved by the Manager, Boston Aircraft Certification Office, ANE–150, Engine and Propeller Directorate, Aircraft Certification Service, FAA, New England Region, 12 New England Executive Park, Burlington, Massachusetts 01803–5299.

This amendment (39–8028, AD 91–19–02) becomes effective October 17, 1991.

Issued in Forth Worth, Texas, on August 26, 1991.

Henry A. Armstrong,

Acting Manager, Rotorcraft Directorate, Aircraft Certification Service.

[FR Doc. 91–22576 Filed 9–18–91; 8:45 am]

BILLING CODE 4910-13-M

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Parts 1 and 602

[T.D. 8364]

RIN 1545–AP20

Corporations; Consolidated Returns—Special Rules Relating To Dispositions and Deconsolidations of Subsidiary Stock

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains technical amendments to § 1.337(d)–1 and final §§ 1.337(d)–2 and 1.1502–20. These regulations implement aspects of the repeal of the General Utilities doctrine by limiting the losses of consolidated groups with respect to the stock of subsidiaries. Section 1.1502–20 also eliminates duplication of loss with respect to the stock of subsidiaries.

DATES: The regulations are effective as of September 13, 1991 except for the removal of § 1.337(d)–2T and the addition of § 1.337(d)–2 which are effective November 19, 1990. Section 1.337(d)–2 generally applies to dispositions and deconsolidations of a subsidiary's stock on or after November 19, 1990 and before February 1, 1991. 1.1502–20 generally applies to dispositions and deconsolidations of a subsidiary's stock on or after February 1, 1991.

FOR FURTHER INFORMATION CONTACT: Mark S. Jennings, 202–566–2455 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

A. Paperwork Reduction Act

The collections of information contained in these final regulations have been reviewed and approved by the Office of Management and Budget in

accordance with the requirements of the Paperwork Reduction Act (44 U.S.C. 3504 (h)) under control number 1545–1160. The estimated annual burden per respondent is 2 hours.

These estimates are an approximation of the average time expected to be necessary for a collection of information. They are based on such information as is available to the Internal Revenue Service. Individual respondents may require greater or less time, depending on their particular circumstances.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be directed to the Internal Revenue Service, Attn: IRS Reports Clearance Officer, T:FP, Washington, DC 20224, and to the Office of Management and Budget, Attn: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

B. Introduction

1. March 9, 1990 Regulations

The loss disallowance rule was first adopted by T.D. 8294, filed with the **Federal Register** on March 9, 1990 and published in the **Federal Register** on March 14, 1990. 1.1502–20T provided generally for the disallowance of all losses of consolidated groups on the disposition of subsidiary stock. 1.1502–20T contained related rules, including a basis reduction rule that applied on deconsolidation of a subsidiary's stock and an anti-stuffing rule that applied to certain transfers of property between members in connection with the disposition or deconsolidation of a subsidiary's stock. The regulations permitted reattribution of a subsidiary's losses to the common parent to the extent the group's loss on the disposition of the subsidiary's stock was disallowed. The rules generally applied to the disposition or deconsolidation of a subsidiary's stock on or after March 9, 1990.

Section 1.337(d)–1T added a transitional rule that generally limited loss on the disposition of a subsidiary's stock after January 6, 1987, if the subsidiary became a member of the group after that date and the disposition was not subject to § 1.1502–20T. Unlike § 1.1502–20T, the transitional rule allowed loss to the extent a group established that the loss was not attributable to the recognition of built-in gain on the disposition of assets of the subsidiary (or any lower tier subsidiary). Instead of reducing the basis of subsidiary stock on deconsolidation of the subsidiary, § 1.337(d)–1T treated the stock (and any successor property) that was deconsolidated during the transitional period as remaining subject to § 1.337(d)–1T even after § 1.1502–20T became effective.

1.337(d)–1T implemented Notice 87–14, 1987–1 C.B. 445, in which the Internal Revenue Service announced its intention to publish regulations that would prevent utilization of §§ 1.1502–32 and 1.1502–33 (c) (the "investment adjustment rules") to circumvent the repeal of the General Utilities doctrine by the Tax Reform Act of 1986. The loss disallowance rule of § 1.1502–20T addressed another problem relating to the investment adjustment rules by preventing a subsidiary's operating losses from being duplicated as an investment loss of the parent when the parent disposes of the subsidiary's stock.

Also filed with the **Federal Register** on March 9, 1990 and published on March 14, 1990, was a notice of proposed rulemaking (CO–78–87) that incorporated by cross reference the text of §§ 1.1502–20T and 1.337(d)–1T. Many written comments were received, and a public hearing was held on June 26, 1990.

2. November 19, 1990 Regulations

After full consideration of the comments and the statements made at the public hearing, the following actions were taken in documents filed with the **Federal Register** on November 19, 1990 and published in the **Federal Register** on November 26, 1990:

a. Proposed § 1.337(d)–1 was amended and promulgated by T.D. 8319 as final § 1.337(d)–1, superseding § 1.337(d)–1T and generally applicable to dispositions of transitional stock before November 19, 1990.

b. New § 1.337(d)–2T was promulgated by T.D. 8319 as a temporary regulation, with a crossreferenced notice of proposed rulemaking (CO–93–90). Section 1.337(d)–2T added a second transitional rule applicable to all subsidiary stock (not just stock to which § 1.337(d)–1 applied) disposed of or deconsolidated on or after November 19, 1990 and before February 1, 1991. This transitional rule allowed groups to establish that loss is not attributable to the recognition of built-in gain, but only if the group's entire equity interest in the subsidiary is disposed of to unrelated persons before the effective date of § 1.1502–20. Section 1.337(d)–2T also provided basis reduction rules for subsidiary stock that is deconsolidated and anti-stuffing rules.

c. Section 1.1502–20T and its crossreferenced notice of proposed rulemaking were withdrawn, and a revised § 1.1502–20 was published as a proposed regulation in a notice of proposed rulemaking (CO–93–90). The provisions of proposed § 1.1502–20 are discussed below.

3. Election To Discontinue Filing Consolidated Returns

In Revenue Procedure 91–11, 1991–6 I.R.B. 9, the Service set forth procedures under which it will grant permission for all of the members of a group to discontinue filing consolidated returns, effective for the group's taxable year that includes November 19, 1990. Revenue Procedure 91–39, 1991–27 I.R.B. 1, extended the deadline to apply for permission to discontinue filing consolidated returns from June 30, 1991 to 90 days after the date proposed § 1.1502–20 is superseded by final regulations.

C. Amendment and Adoption of Section 1.1502–20

After full consideration of the comments and the statements made at the public hearing, proposed § 1.1502–20 is amended and adopted as a final regulation.

Final § 1.1502–20 retains the approach of the proposed regulations. The reasons for adopting this approach are more fully described in the preamble to § 1.1502–20T, filed with the **Federal Register** on March 9, 1990 (55 FR 9426, the "March 1990 Preamble") and in the preamble to proposed § 1.1502–20, filed with the **Federal Register** on November 19, 1990 (55 FR 49075, the "November 1990 Preamble"). This preamble expands the discussion in the earlier preambles of those issues that have remained the principal focus of comments and discusses new issues raised by the amendments to the proposed regulations.

D. Comments on Approach of Proposed Regulations

Following is a discussion of the most significant comments on the modified loss disallowance approach of the proposed regulations and the reasons for accepting or rejecting those comments.

1. Tracing

a. *In general.* Comments continued to argue that the loss disallowance approach inappropriately disallows economic loss on the sale of subsidiary stock and that a tracing approach would be preferable because tracing would more accurately measure economic loss. The comments generally contemplated that tracing would entail the

determination, at the time a subsidiary's stock is acquired, of the built-in gain inherent in each of the subsidiary's assets and the elimination of positive investment adjustments attributable to recognition of that built-in gain when the asset is disposed of.

However, the comments did not have a consistent view of how a tracing approach would be implemented. Some comments endorsed tracing in the abstract, without providing any detail on implementation. Others acknowledged that a tracing approach would be complicated, but urged that various simplifying assumptions be adopted to alleviate complexity. These simplifying assumptions were generally combined in a manner that would inevitably operate to permit significant circumvention of General Utilities repeal or were offered with the proviso that taxpayers be permitted to elect exact tracing whenever the assumptions operated to their detriment, thereby preserving the complexity associated with the tracing approach.

These comments have not persuaded the Treasury Department and the Service that a tracing approach is preferable to the loss disallowance approach. The comments tended to minimize the administrability problems presented by the necessity, under any tracing system, for valuing assets held by a subsidiary at the time its stock is acquired and for determining whether, on the disposition of such assets, any gain represents built-in gain with respect to which positive investment adjustments must be eliminated. The comments also failed to address the problem that, even under a tracing system, it may not be possible to accurately measure economic loss. The reasons the Treasury Department and the Service have rejected a tracing approach are explained in greater detail below.

b. *Valuations.* The Service considers valuations the most difficult administrative problem presented by a tracing approach. Valuations are also required under other Code provisions, and valuation issues are raised by those provisions. However, a tracing approach would present a combination of valuation concerns not present elsewhere:

(i) It would be necessary to value subsidiary assets on an asset-by-asset basis in order to identify built-in gains and losses, to prevent the netting of recognized built-in gain and post-acquisition loss, and to determine economic loss with respect to any particular asset.

(ii) There would not be any tension between buyers and sellers in allocating the purchase price of subsidiary stock among subsidiary assets. Taxpayers would be tempted to convert built-in gain into post-acquisition gain by underallocating value to assets likely to be disposed of and overallocating value to assets likely to be retained.

(iii) The event that would require audit examination of the valuations (*i.e.*, disposition of the subsidiary stock) might not occur for years or even decades. The Service would face enormous difficulty in establishing, many years after the fact, that the valuation of a particular assets was incorrect. Audit difficulties would be multiplied in an acquisition involving a large corporate group or subgroup with a multitude of separate assets.

(iv) Values fluctuate over time. As a result, it may be difficult to identify whether gain is built-in gain or post-acquisition appreciation for purposes of determining whether investment adjustments with respect to that gain should be eliminated. If groups were permitted to take fluctuations in value into account, the Service's audit difficulties would be compounded. On the other hand, if groups were precluded from taking value fluctuations into account, the accuracy of the tracing approach in measuring economic loss would be reduced. In addition, anti-abuse rules would be necessary to prevent taxpayers from engaging in self-help, such as intercompany transfers, to mark declines in value.

c. *Measuring recognized built-in gain.* In addition to ascertaining the amount of each asset's built-in gain at the time a subsidiary is acquired, it would be necessary to develop a system for measuring the extent to which positive investment adjustments are attributable to recognition of the built-in gain. Unlike the limited guidance provided for tracing under §§ 1.337(d)–1 and 1.337(d)–2 during the transitional period, full tracing under § 1.1502–20 would apply permanently and could be implemented only by a systematic approach. Measurement of recognized built-in gain could be accomplished by establishing an earnings and profits (E&P) basis for each asset equal to the asset's value at the time the subsidiary is acquired. The difference between the asset's E&P basis and its tax basis would represent the asset's potential built-in gain or loss.

Example. The P group buys all the stock of T for $100. T owns an asset with a basis of $0 and a value of $100. The E&P basis of the asset is adjusted to $100, solely for investment adjustment purposes, when T joins the P group. T sells its asset for $100 and recognizes $100 of taxable gain. However, because the asset's basis was adjusted to $100 for E&P purposes, there is no gain for investment adjustment purposes. If the P group then sells the T stock for $100 (the value of the proceeds of sale), it recognizes no gain or loss on the stock sale.

Although this system prevents circumvention of General Utilities repeal, it may also eliminate economic loss unless further adjustments are adopted. Assume that T's asset had declined in value and was sold for $80, causing T to realize both a $20 economic loss and a $20 E&P loss (but a $0 tax loss). If the $20 E&P loss is reflected as a negative investment adjustment, the basis of the T stock would be reduced to $80 under the investment adjustment system, and the P group would not subsequently recognize its $20 economic loss when it sold the T stock for $80.

Failure to take the E&P loss into account as a negative adjustment will not always produce an accurate measurement of economic loss however. If an asset is amortizable or depreciable, its built-in gain may be recognized through consumption as well as disposition. See Example 3 of the March 1990 Preamble. If E&P depreciation and amortization are not taken into account, the group that consumes assets through production would be in a better position than the group that sells assets. Greater accuracy would be achieved by reducing the E&P basis to reflect E&P amortization or depreciation, but this would require a separate set of books and would increase the complexity of the measurement system. In addition, a system of E&P depreciation and amortization would not produce complete accuracy in measuring economic loss if an asset depreciates at a faster or slower rate than the rate prescribed for E&P depreciation.

Additional complexity is introduced if a group acquires subsidiary stock with a basis carried over from outside the group. This commonly occurs when an acquired subsidiary has its own lower tier subsidiaries. Adjustments are needed because some or all of the built-in gain inherent in the assets of lower-tier subsidiaries may also be inherent in the acquired subsidiary's stock.

Example. S owns all the stock of T, which has a basis of $0 and a value of $100. T owns assets with a $0 basis and a $100 value. The P group buys all the S stock for $100. S adjusts the E&P basis of the T stock to $100 and T adjusts the E&P basis of its assets to $100. T sells the assets for $100 and T's $100 of sale proceeds is offset by the E&P basis of the assets for investment adjustment purposes. S's basis in the T stock therefore remains $0. If S sells the T stock for $100 (the value of T's assets), S will recognize $100 of gain, thereby duplicating the income already recognized by T from the assets (which, because the assets

had a $0 tax basis, was not offset by tax basis).

The gain duplication illustrated by this example can be avoided by assigning one E&P basis to T's assets for purposes of determining S's investment adjustments with respect to the T stock, and another E&P basis for purposes of the P group's investment adjustments with respect to the S stock. The E&P basis for purposes of the T stock would be equal to S's carryover basis in the T stock. The E&P basis for purposes of the S stock would be equal to the value of T's assets. Additional adjustments would be needed if S's basis in the T stock differs from T's basis in its assets at the time S and T are acquired and if S and T hold stock of other subsidiaries.

2. Loss Disallowance Approach Reflects Balancing of Tax Policy Considerations

The modified loss disallowance approach contained in § 1.1502–20 represents a balancing of tax policy considerations: (i) It is effective in implementing General Utilities repeal because it prevents the elimination of corporate level tax; (ii) it allows the deduction of certain readily identifiable economic loss; (iii) it is administrable by both taxpayers and the Service; and (iv) by limiting loss duplication, it is consistent with the single entity principles reflected in the investment adjustment rules and other consolidated return regulations in that it provides a transition from separate return to consolidated return status by phasing in loss disallowance as the group and the subsidiary operate in consolidated form and it becomes more appropriate to view the group's investment in the subsidiary as an investment in its operations rather than its stock.

Comments have questioned the authority of the Treasury Department and the Service to adopt rules that are contrary to specific provisions of the Code. For example, comments have argued that a stock loss under section 165(g) cannot be denied under the authority of sections 1502 and 337(d), and that the government does not have the authority to limit loss duplication.

The essence of the Service's authority under sections 1502 and 337(d) is the authority to adapt Code provisions to solve problems resulting from the filing of consolidated returns. In addition, regulatory authority under both section 1502 and section 7805 includes the authority to adopt administrable rules. The regulatory authority under which the investment adjustment system was adopted includes the authority to adapt the system to legislative enactments and changing circumstances. As a consequence of the repeal of the General Utilities doctrine, final § 1.1502–02 modifies the application of the investment adjustment rules to prevent elimination of corporate level tax. Because it is not administratively feasible to differentiate between loss attributable to built-in gain and duplicated loss, the final regulations disallow loss with respect to subsidiary stock that is duplicated by the subsidiary's operating losses or built-in losses with respect to its assets. In so doing, the regulations provide an administrable solution to General Utilities repeal and extend the single entity principles underlying the investment adjustment rules and other existing consolidated return rules to losses with respect to subsidiary stock.

Comments challenging the validity of separate elements of the rules contained in the proposed regulations have not recognized the balance achieved by the rules as a whole. The regulations address the potential avoidance of General Utilities repeal through the application of the investment adjustment rules of the consolidated return regulations. The approach adopted in the final regulations achieves a single administrable solution that reasonably balances the tax policy considerations presented in devising a system to implement General Utilities repeal.

Because the Treasury Department and the Service recognized that an administrable system of implementing General Utilities repeal for consolidated groups affects some taxpayers adversely as compared with the separate return system, a transitional period was provided in which tracing was permitted and groups filing consolidated returns before the rules became effective were permitted to elect to discontinue filing consolidated returns.

3. Refinement of the Section 1.1502–20(c) Formula

Section 1.1502–20(c) allows loss to the extent it exceeds an amount determined by a formula: (i) E&P from extraordinary gain dispositions (extraordinary gain factor); (ii) positive investment adjustments in excess of the amount described in (i) (positive adjustment factor); and (iii) duplicated loss (loss duplication factor). The formula is designed to protect against the elimination of corporate level tax while permitting economic loss to the extent feasible without tracing.

Many comments argued that the extraordinary gain and positive adjustment factors should be refined so that they would more accurately measure investment adjustments attributable to recognition of built-in gain. Most of these comments requested that both the extraordinary gain and positive adjustment factors be modified to exclude E&P attributable to the disposition of assets that a subsidiary acquires in taxable transactions after it joins the group.

After careful consideration, the Treasury Department and the Service determined that an exception for after-acquired assets would introduce the same administrative problems as those associated with tracing. Although comments generally assumed that it could be readily determined whether an asset was acquired after a subsidiary joined the group, this relationship may not be readily determinable when a consolidated group acquires subsidiaries in a chain. For example, if S, a member of the P group, acquires T and the P group later sells S to another group, assets that are after-acquired as to the stock of T may or may not be after-acquired as to the stock of S. Additional complexity would arise if, after S is acquired, T or any of its assets are transferred within the acquiring group in tax-free transactions.

Comments assumed that an after-acquired asset rule would not be burdensome, in part because a group would identify gain from after-acquired assets only if it was advantageous to do so. However, because gains and losses are netted within taxable years in applying the positive adjustment factor, all losses and deductions (including cost recovery) attributable to after-acquired assets would have to be identified and excluded from positive adjustments in order to prevent elimination of corporate level tax. This would significantly increase the burden of both taxpayers and the Service in applying the positive adjustment factor.

Comments also urged that numerous other items be excluded from the extraordinary gain and positive adjustment factors. These included: (i) Goodwill; (ii) debt incurred after a subsidiary joins the group; (iii) assets of a subsidiary that may be readily valued at the time the subsidiary joins the group (*e.g.* marketable securities) to the extent of any subsequent gain; (iv) assets acquired by the subsidiary in carryover basis transactions after it joins the group, if the asset basis is reflected in stock basis; (v) assets sold at a loss in a deferred intercompany transaction, to the extent loss is taken into account as a result of a later gain transaction; (vi) positive adjustments attributable to an election under § 1.1502–33(d); and (vii) the excess loss account (ELA) of a lower tier subsidiary

that is taken into account on the disposition of the subsidiary, if the account did not exist when the lower tier joined the group. Incorporation of such exceptions would require the introduction of burdensome rules to prevent potential elimination of corporate level tax and would significantly increase the burden of administration. These exceptions, as well as the after-acquired asset exception, would also delay the phase-in of the loss disallowance rule, thus extending the period for which the Service and groups must monitor extraordinary gains and positive adjustments.

4. Netting of Basis Adjustments For Years on or Before September 13, 1991

Proposed § 1.1502–20(c)(1)(i) does not permit netting of extraordinary gains with extraordinary losses. Proposed § 1.1502–20(c)(1)(ii) permits netting of positive and negative adjustments within the same taxable year, but does not permit a net negative adjustment for one year to offset a net positive adjustment for another year. Many comments suggested that the factors be amended to allow netting of gains and losses attributable to extraordinary dispositions and to allow netting of positive and negative adjustments between years. Some comments argued that it was unduly burdensome to require groups to determine positive adjustments attributable to years ending before the repeal of the General Utilities doctrine because a group might not have the complete prior investment history of subsidiaries acquired in carryover basis transactions.

The Treasury Department and the Service continue to believe that netting of extraordinary gains and losses and of positive and negative adjustments between years should not be permitted. Allowing netting would facilitate planning to circumvent General Utilities repeal. Groups would be able to net built-in gains against post-acquisition losses without reduction in stock basis, and corporate level tax attributable to the built-in gains could be eliminated as a result of the stock loss.

Although the final regulations do not permit netting of positive and negative adjustments for years ending after September 13, 1991, they do provide a transitional rule permitting certain netting of positive and negative adjustments for years ending on or before that date as administrative relief. Netting is permitted for those years because they may include periods when subsidiaries were owned by a prior group or groups, and records of the investment adjustment histories of the subsidiaries may be difficult to obtain.

Under the transitional rule contained in § 1.1502–20(c)(2)(v), the positive adjustment factor is limited, for all taxable years ending on or before September 13, 1991, to the net increase in the basis of a share from (i) the date the share was first acquired by the consolidated group to (ii) the end of any taxable year ending after December 31, 1986 and on or before September 13, 1991, whichever such year end produces the lowest net increase. Netting is not permitted for periods after the taxable year through which this netting rule is applied. For example, if using the net increase in the basis of a share as of the end of the group's taxable year ending December 31, 1988 produces the lowest increase, the group would, in applying § 1.1502–20(c)(1)(ii), not be permitted to offset the net positive adjustments and net negative adjustments arising in subsequent taxable years.

If the share is transferred basis property (within the meaning of section 7701(a)(43)) from a prior consolidated group, the net increase is measured from the date the share was first acquired by the prior group.

Under the transitional rule, positive and negative adjustments include dividends and capital contributions, and any other events affecting stock basis during the period the share is held by a member (or in the case of transferred basis property, a prior consolidated group). Because the purpose of the transitional netting rule is to reduce the difficulty of retroactively determining the source of basis adjustments, no distinction is made between those types of adjustments that taxpayers can identify and those they cannot. For example, deemed dividends elected under § 1.1502–32(f) are treated the same as actual dividends.

Although the netting permitted under the transitional rule may result in elimination of corporate level tax, taxpayers have no opportunity after the filing of final § 1.1502–20 to enhance elimination through planning, and the substantial administrative relief provided by the rule is therefore considered warranted.

5. Interaction of Section 1.1502–20 With Other Rules

Many comments expressed concern about the difficulties presented by the interaction of the worthless stock deduction, the triggering of ELAs, the loss disallowance rule, and judicial protection of a bankrupt corporation's tax attributes. Comments have also questioned the interaction of the loss disallowance rule and the proposed regulations providing that section 304 does not apply in the consolidated return context. These issues will be addressed in future guidance. See also § 1.1502–20(e)(3), Example 2 (with respect to certain applications of § 1.1502–20 to intercompany stock sales).

6. Anti-Breakup Rule

The March 1990 Preamble announced that consideration was being given to adopting some form of anti-breakup rule in the final regulations, and that the rule would apply on a retroactive basis from the effective date of § 1.1502–20T. The rule was to prevent the sheltering of post-acquisition gain when a target is disposed of within 2 years after its stock is acquired by a group.

The final regulations do not incorporate such a rule, and in the absence of evidence of significant abuse, the Treasury Department and the Service do not plan to adopt such a rule. If it is determined in the future that an anti-breakup rule is necessary, the announcement in the March 1990 Preamble will not be treated as notification of the future rule.

7. Other General Comments

Comments continued to argue that the proposed regulations be modified in several respects, including disregarding wasting assets, limiting loss disallowance on the basis of caps or imputed rates of return on corporate assets, and deleting the loss duplication factor. For the reasons stated in the November 1990 Preamble, the Treasury Department and the Service have rejected such modifications.

E. Comments on Specific Provisions of Proposed Regulations

1. Amendments to section 1.1502–20(a)

a. Intercompany Loss

If loss is recognized on the transfer of member stock in an intercompany transaction, section 267(f) defers the loss, but proposed § 1.1502–20(a) would override section 267(f) and disallow the loss before it can be deferred. Comments argued that the section 267 rules should override loss disallowance rather than the reverse because the disallowed loss is tiered up under the investment adjustment system and may result in gain when a member other than the member whose stock was transferred in the intercompany transaction ceases to be a member of the group.

It is inconsistent with a single entity view of consolidated groups to disallow loss on an intercompany transfer of

stock that continues to be owned within the group. Accordingly, the rule of the proposed regulations is modified to provide that § 1.1502–20 overrides section 267 only at the time the stock of the member that was transferred in the intercompany transaction: (i) Ceases to be owned by a member of the consolidated group, (ii) is cancelled or redeemed (regardless of whether it is retired or held as treasury stock), or (iii) is disposed of under § 1.1502–19(b)(2) (other than § 1.1502–19(b)(2)(ii)).

The corresponding rules in §§ 1.337(d)–1 and 1.337(d)–2 are similarly revised.

b. Netting

Proposed § 1.1502–20(a) permits the netting of gain and loss from the sale of common stock of a subsidiary that is sold to the same purchaser pursuant to a single plan. Comments requested expansion of the single purchaser rule. They also requested expansion of the netting rule to include "related" dispositions involving gain and loss on the stock of different subsidiaries, and on preferred stock as well as common stock.

The final regulations provide that the netting rule applies to all dispositions of stock of a subsidiary, to the extent that, as a consequence of the same plan or arrangement, gain is taken into account by members with respect to stock of the same subsidiary having the same material terms. Thus, the netting rule may apply whether the buyer is the public, a member of the same consolidated group, or otherwise, and whether the amount is currently recognized or a previously deferred amount that is currently taken into account. Similarly, the netting rule may apply to the disposition of preferred stock.

The netting rule has not been further expanded because gains and losses on sales of different classes of a subsidiary's stock, of the same class of a subsidiary's stock taken into account at different times, or of stock of different subsidiaries, may be unrelated to each other, and netting of such gains and losses may permit circumvention of General Utilities repeal.

Because the final regulations also extend netting to the basis reduction rule under § 1.1502–20(b), and both §§ 1.1502–20(a) and 1.1502–20(b) may apply to the same transaction, an anti-duplication rule has been added.

Section 1.1502–19(a)(6) of the existing regulations provides an election to apply an ELA to reduce the basis of any other stock. (Section 1503(e)(4) eliminates a similar election to reduce the basis of indebtedness.) Because an election under § 1.1502–19(a)(6) has the effect of netting one share's gain against another share's basis that may produce a loss subject to § 1.1502–20(a), the availability of the election is limited to conform to the availability of netting under § 1.1502–20 (a) and (b).

2. Amendments to Section 1.1502–20(b)

a. Netting of Gain and Basis Reduction

Under the proposed regulations, the basis of subsidiary stock is reduced to fair market value when the stock ceases to be owned by a member of a consolidated group of which the subsidiary is also a member (a "deconsolidation" event). Comments requested an upward adjustment to the basis of deconsolidated stock to offset any gain deferred in an earlier intercompany sale of the deconsolidated stock. Under § 1.1502–13T(l), deferred gain is taken into account when the basis increase attributable to the deferred intercompany sale is recovered by the group, and basis reduction on deconsolidation constitutes a basis recovery for this purpose.

Consistent with a single entity view of consolidated groups, the basis reduction on deconsolidation under § 1.1502–20(b) is eliminated to the extent that, as a consequence of the same plan or arrangement as that giving rise to the deconsolidation, gain is taken into account by members with respect to stock of the same subsidiary having the same material terms. This relief is comparable to the netting relief available under § 1.1502–20(a). Because both §§ 1.1502–20(a) and 1.1502–20(b) may apply to the same transaction, an anti-duplication rule and additional examples are included.

If a subsidiary's stock is sold at a loss in a deferred intercompany transaction, and the subsidiary is subsequently deconsolidated (*e.g.*, through issuance of new stock to nonmembers), the basis reduction that would have occurred under § 1.1502–20(b) if the deferred intercompany transaction had not taken place causes the deferred loss to be taken into account under § 1.1502–13T(l) at the time of the deconsolidation. The deferred intercompany loss taken into account at the time of the deconsolidation may not be netted against any gain with respect to the stock that is attributable to periods after the intercompany transfer unless the gain is also taken into account at the time of the deconsolidation, because netting is available only for gain and basis reduction taken into account as a consequence of the same plan or arrangement as that giving rise to the deconsolidation.

b. Statement for Loss Within 2 Years

Under the proposed regulations, if stock was disposed of within 2 years after a basis reduction on deconsolidation, § 1.1502–20(b)(5) required that a statement be filed with the taxpayer's return for the year of disposition. Because valuation issues are presented under § 1.1502–20(b) on every deconsolidation, the final regulations clarify that the statement is to be filed even if stock basis is not actually reduced on the deconsolidation. In addition, minor errors in the description of the required information are corrected.

c. Restoration of Basis Lost Under Deconsolidation Rule

Under the proposed regulations, the basis of subsidiary stock is reduced to fair market value when the stock ceases to be owned by a member of a consolidated group of which the subsidiary is also a member (a "deconsolidation" event). Comments requested that basis lost under the deconsolidation rule be restored to offset gain if the group later sells the stock at a gain.

If basis restoration were permitted, complex additional rules would be required. For example, it would become necessary to trace deconsolidated stock that is transferred in nonrecognition transactions. In addition, the antistuffing rules of the proposed regulations would have to be extended to separate returns, and rules would be needed for subsidiaries rejoining the group following a deconsolidation (*e.g.*, netting of related gain and loss stock dispositions, reattribution of disallowed loss, and measurement of loss duplication). Consequently, the suggested amendments are not adopted in the final regulations.

3. Amendments to Section 1.1502–20(c)

a. Extraordinary Gain Dispositions

Proposed § 1.1502–20(c)(2)(i) identifies the events that are treated as extraordinary gain dispositions. The final regulations include a change in method of accounting resulting in a positive section 481 adjustment in the list of events constituting extraordinary gain dispositions. For example, if a subsidiary joins a group and elects to recover its LIFO reserve under section 481, the recover is treated as an extraordinary gain disposition. Otherwise, on a subsequent disposition of the subsidiary stock, the income attributable to the recovery of the reserve could be offset by loss attributable to basis generated by the

recovery. The final regulations also clarify that extraordinary gain dispositions include only events that occur on or after November 19, 1990 and that result in income or gain for purposes of computing E&P. For this purpose, an accounting method change that occurs on or after November 19, 1990 is treated as an extraordinary gain disposition even if all or a part of the adjustment resulting from the change is attributable to periods before November 19, 1990.

The final regulations also provide that extraordinary gain dispositions include any additional events (or items) that the Commissioner identifies in revenue rulings and revenue procedures.

The proposed regulations provided that E&P attributable to extraordinary gain dispositions is reduced for directly related expenses, including federal income taxes, provided they are reflected as negative investment adjustments. Comments described difficulties in attributing a group's federal income taxes to particular transactions and in determining whether the taxes resulted in negative investment adjustments. Some comments argued that payments under tax sharing agreements should be treated as taxes for purposes of these rules. Others argued that a 34% rate should be imputed in every transaction.

The final regulations adopt a simplified approach that provides groups paying federal income taxes with maximum credit for those taxes while protecting against the transfer of tax benefits. Under the final regulations, the amount of federal income taxes attributable to extraordinary gain dispositions is the excess (if any) of the group's income tax liability actually imposed under subtitle A of the Code for the taxable year over the liability redetermined by not taking into account any extraordinary gain dispositions. For this purpose, the group's tax liability is determined without taking into account the foreign tax credit.

This approach is easily administered and allows taxes to be taken into account at the rates actually paid by the group in the year of the extraordinary gain disposition without regard to which member actually bears the tax or whether payments are made under a tax sharing agreement.

b. E&P Reflected in Basis

The proposed regulations effectively treated all E&P from extraordinary gain dispositions and positive investment adjustments as contributing to a loss on the disposition of stock. Comments argued that this treatment is not correct in all cases. For example, section 1503(e)(1)(A) requires the consolidated group to redetermine stock basis for purposes of determining gain or loss to account for tax benefits realized with respect to the subsidiary. The reference to E&P in the proposed regulations was intended to take into account adjustments pursuant to section 1503(e) and any similar provisions.

The final regulations clarify that, for purposes of the extraordinary gain and positive adjustment factors, E&P is taken into account only to the extent that it is "reflected" in the basis of a subsidiary's stock, directly or indirectly, immediately before a disposition or deconsolidation, after applying section 1503(e), § 1.1502–32(g), and other applicable provisions of the Code and regulations.

Under this rule, E&P is considered to be reflected in stock basis if the E&P was taken into account in determining stock basis but was distributed. Thus, amounts are considered reflected in stock basis whether or not basis is actually increased, so long as the basis is different than it would have been if the E&P had not been taken into account. Moreover, E&P derived by partnerships and other passthrough entities may be considered reflected for this purpose.

Additional examples are added to clarify when E&P is reflected in stock basis, and when it is treated as resulting in adjustments under § 1.1502–32 (b)(1)(i) and (c)(1).

c. Loss Duplication

Comments argued that if duplication is to be eliminated the regulations should provide for the reduction of the buyer's inside attributes (including basis) rather than the seller's outside stock loss. Comments have not, however, identified practical methods of providing meaningful reduction of inside attributes without unreasonable complexity. The complexity results from the necessity of identifying the attributes causing the duplication. In order to accurately reduce asset basis it would be necessary to identify the extent to which the stock loss is attributable to particular assets with basis in excess of value rather than to built-in gain assets or assets whose basis is unlikely to be recovered in the near term. Moreover, the rules would have to take into account multiple tiers of subsidiaries with varying disparities between asset and stock basis.

Some comments suggested that attributes clearly unrelated to stock loss (*e.g.*, built-in or separate return limitation year (SRLY) losses not reflected in basis of subsidiary stock) should be excluded from the loss duplication factor. Relief for built-in losses could not be provided without the associated complexity described above. Relief for SRLY losses was provided when proposed § 1.1502–20(g) amended the reattribution rule to permit the reattribution of SRLY losses. Accordingly, no further modifications have been provided as a result of these comments.

Comments also requested clarification of the time that duplicated loss is determined. For example, if an insolvent subsidiary is to be liquidated, comments questioned whether the subsidiary's net operating losses should be taken into account in determining duplicated loss, because the parent would not succeed to the losses. See, *e.g.*, Treas. Reg. § 1.332–2(b); Rev. Rul. 68–359, 1968–2 C.B. 161. Based on the comments, § 1.1502–20(c) has been amended to clarify that duplicated loss is measured immediately after the applicable disposition or deconsolidation. Because a loss that is reattributed under § 1.1502–20(g) would be reflected in the basis of subsidiary stock immediately before a disposition, § 1.1502–20(g) is revised to prevent circularity.

Comments also requested clarification of the "other relevant items" included in determining duplicated loss and of the proper treatment of disparities between the basis of interests in passthrough entities and the assets of those entities. Because these issues are common to other Code provisions, such as sections 338 and 382 (h), their resolution is deferred until guidance is developed under those provisions.

4. Amendments to Section 1.1502–20 (d)

Section 1.1502–20(d) provides that § 1.1502–20 may apply to any property the basis of which is determined by reference to the basis of a subsidiary's stock. Example 1 of proposed § 1.1502–20(d)(2) described the consequences of a tax-free reorganization under section 368(a)(1)(B) in which a subsidiary leaves one consolidated group and joins another. The example concluded that the transaction caused a deconsolidation of the subsidiary and therefore required a basis reduction under § 1.1502–20(b) immediately before the subsidiary left the transferor group. Comments argued that basis reduction in this circumstance was inconsistent with the principles of § 1.1502–20(b) because the subsidiary's stock continued to be held after the transaction by members of a consolidated group of which the subsidiary was a member.

The proposed Example 1 has been modified to reflect these comments.

Under the final regulations, because the subsidiary's stock remains subject to § 1.1502–20, the stock is not deconsolidated and the transferee group's basis in the stock is determined without taking into account the basis reduction under § 1.1502–20(b). However, under the successor rule of § 1.1502–20(d), which applies to the extent necessary to effectuate the purposes of § 1.1502–20, the transferor group must reduce to fair market value the basis of the stock received in the reorganization. The successor rule applies to the stock received by the transferor group because the group otherwise would be able to convert its disallowed loss on the subsidiary stock to an allowed loss on the stock of a nonmember received in the transaction.

5. Amendments to Section 1.1502–20(e)

a. Substantive Application of Rules

The purpose of § 1.1502–20(e), to prevent avoidance transactions, is clarified by adding an express provision requiring that the rules of § 1.1502–20 be construed in a manner that is consistent with and reasonably carries out their purposes. If a taxpayer acts with a view to avoid the effect of the rules of § 1.1502–20, adjustments will be made as necessary to carry out their purposes. Examples are added to illustrate the application of this provision.

b. Scope of Stuffing Transactions

The anti-stuffing rule of the proposed regulations is retained and clarified in the final regulations. Because section 267(f) permits basis to be shifted within consolidated groups through deferred intercompany transactions, comments noted that transactions subject to section 267(f) should, where appropriate, be treated as stuffing transactions. The final regulations add an example to illustrate the application of paragraph (e) to transactions under section 267(f).

In addition, amendments have been made to the proposed anti-stuffing rule to clarify its application to any transfer with a view to avoiding the disallowance of loss, reduction of basis, or the recognition of gain. As amended, the rule applies without regard to which member of the group is the transferee.

6. Amendments to Section 1.1502–20(f)

a. E&P Effects of Basis Reductions

Comments suggested that the determination of E&P under proposed § 1.1502–20(f) was unclear in certain cases. For example, if the common parent owns stock of a first tier subsidiary and the basis of the stock is reduced under § 1.1502–20(b), the proposed regulations are unclear as to whether the common parent's E&P must be reduced to reflect the basis adjustment.

The final regulations amend § 1502–20(f) to clarify that any amount by which basis is reduced is treated for E&P purposes as a loss arising and absorbed by the subsidiary in the taxable year of the basis reduction. Thus, in the example above, the common parent's E&P would be reduced to reflect a basis reduction. The final regulations also clarify that deconsolidation of a share is treated as a disposition of the share for purposes of determining when investment adjustments are made and E&P is determined with respect to the share.

b. Basis Reduction Account

Before 1988, a deconsolidation caused the basis of subsidiary stock to be reduced by an amount equal to the stock's net positive investment adjustments. See § 1.1502–32(g). This reduction prevented dividend stripping of consolidated E&P in separate return years after the deconsolidation. It was replaced by § 1.1502–32T(a), which establishes a "basis reduction account" for any deconsolidated subsidiary's stock retained by the group. Under § 1.1502–32T(a), basis is reduced by dividend distributions to the extent of the balance in the account. Although distributions following deconsolidation reduce both the account and stock basis (to the extent of the account), § 1.1502–20(f) treats any basis reduction in connection with a deconsolidation under the loss disallowance rules as not reducing the account. One comment argued that the account should be reduced because the basis reduction reverses the net positive adjustments reflected in the account.

The final regulations retain the basis reduction account rule for the proposed regulations. Section 1.1502–20 disallows loss and reduces basis attributable to recognized built-in gain. Dividend stripping should not be a mechanism for avoiding the loss disallowance rules where the E&P is attributable to the recognition of built-in gain during consolidated return years.

c. Tiering Up of Disallowed Loss

Loss disallowed under § 1.1502–20 results in negative investment adjustments, to the same extent as if the loss had been allowed, to eliminate higher tier basis attributable to built-in gain or duplication. Comments argued that tiering up of disallowed loss may produce incorrect results, for example, by producing an ELA for one member that cannot be netted with another member's disallowed loss with respect to stock of the same subsidiary.

The proposed regulations have not been modified to reflect these comments. To the extent that stock basis is increased because of the recognition of built-in gain, the basis of stock of higher tier members is also increased under the investment adjustment system and may prevent an ELA that would have existed otherwise If the increase results in a disallowed loss on the disposition of stock of a lower tier subsidiary, there should be a corresponding decrease in the basis of stock of higher tier subsidiaries. If tiering up the disallowed loss results in an ELA with respect to higher tiers, the ELA is appropriate because it results from eliminating the effects of the recognized built-in gain.

7. Amendments to Section 1.1502–20(g)

a. Definition of Insolvency

Under § 1.1502–20(g), the common parent of a group is permitted to reattribute to itself certain losses of a subsidiary when a loss on the subsidiary's stock is disallowed. Because circumvention of General Utilities repeal would be possible if losses borne by creditors of the subsidiary (rather than by the group) could be reattributed to the common parent, the proposed rules limit reattribution from insolvent subsidiaries.

If a subsidiary borrows funds directly, its losses may be borne by its direct creditors regardless of the solvency of higher tier members of the group. On the other hand, if a higher tier member borrows funds that are contributed to a subsidiary, the subsidiary's loss of the funds may be borne by creditors of the higher tier member even though the subsidiary is itself solvent (because it incurred no debt).

Because the proposed regulations measured insolvency by taking into account all higher tier subsidiaries, groups would have been able to reattribute losses borne by creditors merely because of the presence of solvent higher tier subsidiaries. To prevent the reattribution of losses that are in fact borne by creditors, the proposed regulations are amended to determine insolvency by taking into account only the sum of the separate insolvencies of the reattributing subsidiary and those higher tier subsidiaries that are insolvent. Special rules are provided for preferred stock and intercompany liabilities.

Under the proposed regulations, insolvency was defined as the excess of

a subsidiary's liabilities over the fair market value of the subsidiary's assets. Comments suggested that alternative insolvency measurements should be available. For example, they suggested that insolvency be measured as either—

(i) The excess of the subsidiary's liabilities over the greater of (*A*) the fair market value of its assets, or (*B*) the adjusted basis of its assets; or

(ii) The lesser of (*A*) the subsidiary's insolvency, or (*B*) the sum of its adjustments for extraordinary gain dispositions and positive investment adjustments.

These suggestions are not adopted in the final regulations. Measuring insolvency by reference to the basis rather than the value of assets would introduce such problems as the proper treatment of built-in loss assets and loss carryovers from pre-acquisition years, disparities between the stock and asset basis of lower tier subsidiaries, duplication of basis if the stock and securities of lower tier subsidiaries are taken into account as well as their assets, and allocation of basis to minority stock ownership. Insolvency could not be measured by reference to extraordinary gain dispositions and positive investment adjustments because there is no relationship between insolvency and these factors.

b. Availability of Reattribution

Under the proposed regulations, reattribution of losses is available to the extent loss is disallowed but not to the extent basis is reduced in deconsolidation. Comments requested that reattribution also be permitted in connection with deconsolidations (or, if not at the time of deconsolidation, when the deconsolidated subsidiary's stock is sold by the group).

The final regulations do not extend the availability of reattribution to deconsolidation because permitting such reattribution would permit the transfer of attributes without an arm's-length transaction to protect against mismeasurement of the amount of loss. Permitting reattribution at the time deconsolidated stock is ultimately sold by the group would permit the transfer to the group of losses incurred after the subsidiary began filing separate returns.

The final regulations also clarify that reattribution is available only to the extent loss would be disallowed following the application of § 1.1502-20(c) (regardless of whether the statement required by § 1.1502-20(c)(3) is filed). Moreover, the amount of loss that would be disallowed and the losses that may be reattributed are determined immediately after the disposition, but the reattribution is deemed to be made immediately before the disposition.

c. Applicability of Section 382 and SRLY Following Reattribution

Comments requested clarification as to the application of section 382 and the SRLY rules to losses that are reattributed under § 1.1502-20(g). The proposed regulations provided that the common parent succeeds to the reattributed losses as if the losses were succeeded to in a transaction described in section 381(a).

First, comments asked whether reattributed SRLY losses retain their character as SRLY losses. It is clear under § 1.1502-1(f) that SRLY losses of a predecessor of the common parent retain their character as SRLY losses following a transaction described in section 381(a). *See, e.g.,* Rev. Rul. 75-378, 1975-2 C.B. 355. Under § 1.1502-20(g), the subsidiary whose losses are reattributed is treated as a predecessor whose reattributed losses are succeeded to by the common parent in a transaction described in section 381(a). Proposed Example 3 of § 1.1502-20(g)(4) has been clarified to show that reattributed SRLY losses retain their character as SRLY losses. The SRLY limitation applicable to reattributed losses is based on the contribution of the common parent to the consolidated taxable income of the group.

Second, comments inquired as to the application of proposed § 1.1502-91 through § 1.1502-99 to reattributed losses. Clarification will be provided in connection with finalizing proposed § 1.1502-91 through § 1.1502-99 and proposed § 1.1502-21. For example, it is anticipated that § 1.1502-95 will be modified to provide that the common parent will be permitted to elect to retain all or any part of a section 382 limitation that applies to reattributed SRLY losses.

d. Contingent Reattribution of Loss

Comments requested that the provisions permitting reattribution of loss be expanded to permit certain adjustments to the reattribution based on subsequent events, for example, the redetermination of the amount of loss available for reattribution on a subsequent audit.

The final regulations do not adopt the suggested amendments. The rules already provide significant flexibility in identifying the losses to be reattributed. Because the group and the member whose losses are reattributed may be under the control of separate taxpayers following the disposition or file returns in different Service Centers, it would be administratively burdensome for the Service to coordinate subsequent adjustments.

8. Amendments to Section 1.1502-20(h)

a. Application of Section 1.1502-20T

Under the proposed regulations, taxpayers may elect to apply § 1.1502-20 to dispositions on or after November 19, 1990 rather than the general February 1, 1991 effective date of § 1.1502-20. Comments requested that, because of the burdens associated with tracing under § 1.337(d)-1, the attractiveness under proposed § 1.1502-20 and § 1.1502-20T of netting of gain and loss and reattributing disallowed losses, and the difficulty of determining whether worthlessness has occurred before or after a particular date, groups be permitted to elect to apply the rules of proposed § 1.1502-20 for dispositions before November 19, 1990. Comments also urged that groups be permitted to rely, in appropriate cases, on the rules under § 1.1502-20T, which were retroactively withdrawn on November 19, 1990.

Failure to permit taxpayers that entered into transactions to which § 1.1502-20T applied by its terms to continue to rely on that section was an oversight. Because taxpayers, in reliance on its provisions, may have completed transactions following the issuance of § 1.1502-20T (or entered into binding contracts following the issuance of § 1.1502-20T which closed after it was withdrawn and while either § 1.337(d)-2 or § 1.1502-20 was effective), those temporary regulations are made available for stock dispositions on or after March 9, 1990 and before November 19, 1990 (as well as to subsequent dispositions pursuant to contracts that were binding on November 19, 1990), provided the taxpayer certifies that it is applying § 1.1502-20T to all dispositions of subsidiary stock occurring during that period. The taxpayer may not withdraw the certification. Because taxpayers were notified on November 19, 1990 of the withdrawal of § 1.1502-20T, however, § 1.1502-20T may not be applied to dispositions on and after that date (other than dispositions pursuant to a contract binding on that date).

Although comments requested that groups be permitted to elect to apply proposed § 1.1502-20 for dispositions before November 19, 1990, this election has not been provided.

b. Binding Contracts Generally

Comments asked that the binding contract rule be expanded to include letters of intent or some form of

"substantial activity" indicating an intention to proceed with a transaction. Other comments requested the ability to modify contracts in certain respects without losing the benefit of the binding contract rule. No amendments have been adopted in this regard.

The purpose of binding contract and similar rules is to permit transactions to be taxed under the rules that may have been taken into account in determining the irrevocable terms of the transaction. The factual and legal issues relevant to the determination of whether a contract is binding are not unique to these regulations, and, accordingly, no guidance is provided in these regulations.

c. Reasonable Reliance on Proposed Section 1.1502–20

To the extent that taxpayers have relied in good faith on the provisions of proposed § 1.1502–20 and are adversely affected by the amendments adopted as part of finalizing § 1.1502–20, requests may be submitted to the Service for relief under section 7805(b).

d. Effective Dates

Final § 1.1502–20 generally applies with respect to dispositions and deconsolidations occurring on or after February 1, 1991. However, taxpayers may elect to apply § 1.1502–20 to dispositions and deconsolidations occurring on or after November 19, 1990.

F. Amendment and Adoption of Section 1.337(d)–2

After full consideration of the comments and the statements made at the public hearing, proposed § 1.337(d)–2 is amended and adopted as a final regulation, superseding § 1.337(d)–2T as of November 19, 1990. Section § 1.337(d)–2 provides a window period in which the rules of § 1.337(d)–1 are carried forward and more broadly applied. The purpose of this window period was to allow groups to complete transactions initiated on or before November 19, 1990.

Final § 1.337(d)–2 generally applies with respect to dispositions and deconsolidations occurring on or after November 19, 1990 and before February 1, 1991 (the effective date of § 1.1502–20). However, a group may apply § 1.337(d)–2 (c) to establish that loss is not attributable to the recognition of built-in gain only if the group's entire equity interest in the subsidiary is disposed of to unrelated persons before February 1, 1991. Thus, § 1.337(d)–2 (c) does not apply if only a portion of the stock held by the group is disposed of, or if the stock is sold to a related person.

Many of the amendments to § 1.337(d)–2 conform to the amendments to § 1.1502–20, described in paragraph E, above. To eliminate duplication, many of the provisions of § 1.337(d)–2 have been replaced by crossreferences to similar provisions of § § 1.337(d)–1 and § 1.1502–20. To facilitate this crossreferencing, the facts of Examples 1 and 2 of § 1.1502–20(b) have been modified so that they apply to both § 1.1502–20 and § 1.337(d)–1. No substantive change is intended by these amendments.

To the extent that taxpayers have relied in good faith on the provisions of § 1.337(d)–2T and are adversely affected by the amendments adopted as part of finalizing § 1.337(d)–2, requests may be submitted to the Service for relief under section 7805(b).

1. Dispositions to Related Parties

In order to be able to use tracing to prove that stock loss during the window period is not attributable to recognized built-in gain, the group must dispose of the subsidiary's stock to an unrelated person. Many comments criticized this requirement, and asked that groups be permitted worthless stock loss and loss on liquidating distributions of lower tier stock (*e.g.*, liquidations under section 367 to a foreign parent corporation).

Relief has been extended to worthless stock losses but not to liquidations. The purpose of the unrelated person requirement is to limit the availability of tracing to cases in which there was a meaningful disposition of the subsidiary during the window period. Because worthless stock loss is difficult to establish and is the product of involuntary events, the Treasury Department and the Service determined that relaxation of the related party requirement with respect to worthlessness of subsidiary stock was warranted. In contrast, liquidation of subsidiary stock merely rearranges assets among related entities. The availability of tracing therefore is not extended to liquidations.

Although some comments argued that special considerations were raised as to the application of General Utilities repeal to section 367(e)(2) (*i.e.*, liquidating distributions by a domestic parent of stock of domestic subsidiaries to a foreign higher tier corporation), the Treasury Department and the Service determined that section 367 presents no special General Utilities repeal considerations that warrant preferential treatment for liquidations subject to that provision.

2. Measurement of Built-In Gain

Built-in gain is defined under proposed § 1.337(d)–2(c)(2) as gain attributable, directly or indirectly, in whole or in part, to any excess of value over basis attributable to a separate return year (as defined in § 1.1502–1(e)) with respect to the consolidated group (or prior consolidated group).

Comments argued that built-in gain should be limited to appreciation attributable to a separate return limitation year (as defined in § 1.1502–1) rather than to a separate return year. This limitation would exempt appreciation arising after a subsidiary joins a group but before the group becomes a consolidated group. The comments argued that stock loss should not be disallowed with respect to such gain because it is not reflected in the subsidiary's stock basis before the assets are disposed of.

To resolve the issues arising under the proposed definition of built-in gain and conform the definition to § 1.1502–20(c), the definition is amended. Under the amended provisions, built-in gain is defined by referring to appreciation that is reflected, before the disposition of the asset, in the basis of the share, directly or indirectly, after applying section 1503(e) and other applicable provisions of the Code and regulations. Accordingly, appreciation arising in separate return years is not treated as built-in gain unless it is reflected in stock basis before the disposition of the asset.

The amendment also addresses additional problems raised by the proposed and temporary regulations. For example, if a built-in gain asset of a corporation is exchanged in a nonrecognition transaction after the corporation becomes a member of a consolidated group, the proposed regulations are unclear as to whether gain on the asset acquired in the exchange is built-in gain, because the asset was not held by the subsidiary when it became a member of the consolidated group. Under the amendment, the gain is built-in gain, and the disposition of the asset acquired in the exchange results in disallowance of loss on the sale of the subsidiary's stock. Guidance as to when appreciation is considered to be reflected in basis is contained in § 1.1502–20(c)(2) and § 1.1502–20(e).

Although § 1.337(d)–2(c) confirms that a subsidiary's built-in gain and built-in loss may be netted, comments also questioned whether built-in gain recognized by one subsidiary may be netted with built-in loss recognized by

another subsidiary in the same chain. Because the principles of the regulations authorize netting where stock reflects or fails to reflect both amounts, no amendments are needed in this regard.

3. Effective Dates

Comments argued that requiring tracing for pre-Notice 87-14 basis is an invalid retroactive denial of loss, and that the administrative burdens of tracing investment adjustments back to 1966 are unreasonable. Other comments argued that subsidiaries becoming members of consolidated groups before January 7, 1987 should not be subject to tracing during the window period. These latter comments argued that neither Notice 87-14 nor § 1.1502-20T put these subsidiaries on notice that they would be subject to tracing or to loss disallowance because the regulations were withdrawn, and taxpayers are entitled to notice before application of the loss disallowance rules.

The window period tracing rule was adopted in response to taxpayer comments, and taxpayers therefore had adequate notice. Applying tracing to all subsidiaries during the window period is consistent with the decision, explained in the November 1990 Preamble, not to grandfather pre-1987 subsidiaries from the application of § 1.1502-20.

For the reasons described in paragraph E.8.a., above, the effective date of § 1.337(d)-2 provides that § 1.1502-20T (which was withdrawn by T.D. 8319) may be applied to certain dispositions occurring on or after November 19, 1990 pursuant to contracts that were binding on November 19, 1990.

G. Amendments to Section 1.337(d)-1

Section 1.337(d)-1 applies to stock of corporations that became members of a group after January 6, 1987, if the stock is disposed of and neither § 1.337(d)-2 nor § 1.1502-20 apply with respect to the disposition. Stock loss is disallowed except to the extent the group establishes the loss is not attributable to recognized built-in gain on the disposition of an asset. Section 1.337(d)-1 is described in the March 1990 and November 1990 Preambles.

Although § 1.337(d)-1, as finalized, confirms that a subsidiary's built-in gain and built-in loss may be netted, comments questioned whether built-in gain recognized by one subsidiary may be netted with built-in loss recognized by another subsidiary in the same chain. Because the regulations authorize netting where stock reflects or fails to reflect both amounts, no amendments are needed to permit this result.

Certain amendments have been made to § 1.337(d)-1(a) to conform to the amendments to § 1.1502-20. These amendments are described in paragraph E, above.

For the reasons described in paragraph E.8.a, above the effective date of § 1.337(d)-1 is amended to provide that § 1.1502-20T (which was withdrawn by T.D. 8319) may be applied to dispositions occurring before November 19, 1990 (and for certain subsequent dispositions pursuant to contracts that were binding on November 19, 1990).

Comments requested a binding contract rule for agreements entered into on or after March 9, 1990, and before November 19, 1990, in order to remain subject to § 1.337(d)-1. Groups may want to apply § 1.337(d)-1 rather than § 1.337(d)-2 because of the requirement under § 1.337(d)-2(c) that the group's entire equity interest in a subsidiary be disposed of before the effective date of § 1.1502-20, and because of the deconsolidation limitations of § 1.337(d)-2(b). The final regulations do not expand the binding contract rule because taxpayers entering into agreements on or after March 9, 1990 had no reasonable expectation of an extension of the § 1.337(d)-1 rules.

Special Analyses

These final regulations are not major rules as defined in Executive Order 12291. Therefore a Regulatory Impact Analysis is not required.

It is hereby certified that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations.

It is hereby certified that these rules do not have a significant impact on a substantial number of small entities. The rules will primarily affect affiliated groups of corporations filing (or required to file) consolidated returns, which tend to be larger businesses. The rules will not significantly alter the reporting or recordkeeping duties of small entities. Therefore, a final Regulatory Flexibility Analysis under the Regulatory Flexibility Act (5 U.S.C. chapter 6) is not required.

Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking for the regulations was submitted to the Chief Counsel for Advocacy of the Small Business Administration for comment on the impact of the rules on small business.

Drafting Information

The project attorney is Mark S. Jennings of the Office of Assistant Chief Counsel (Corporate), Internal Revenue Service. Other personnel of the Internal Revenue Service and the Treasury Department also participated in the development of these regulations.

List of Subjects in 26 CFR

1.261-1 Through 1.280H-1T

Income taxes, Reporting and recordkeeping requirements.

1.336-1 Through 1.383(h)(10)-1T

Income taxes, Reporting and recordkeeping requirements, Securities.

1.1501-12 Through 1.1502-100

Income taxes.

Part 602

Reporting and recordkeeping requirements.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR parts 1 and 602 are amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority for part 1 is amended by removing the citation for § 1.337(d)-2T and adding the following citations:

Authority: Sec. 7805, 68A Stat. 917; 26 U.S.C. 7805 * * * § 1.337(d)-2 also issued under 26 U.S.C. 337(d) * * * § 1.1502-19 also issued under 26 U.S.C. 1502 * * * § 1.1502-20 also issued under 26 U.S.C. 337(d) and 1502.

Par. 2. Section 1.267(f)-3T is redesignated as § 1.267(f)-3, and is revised to read as follows:

§ 1.267(f)-3 Disposition or deconsolidation of subsidiary stock.

For purposes of applying section 267(f)(2) to the sale or exchange of the stock of one member of a consolidated group by another member, see §§ 1.337(d)-1(a), 1.337(d)-2(a), and 1.1502-20(a). For purposes of this section, the definitions in § 1.1502-1 apply.

Par. 3. Section 1.337(d)-1 is amended by revising paragraphs (a)(3), (a)(5) Example 8, (b)(3), (d)(1), and (e)(1) and by adding a new paragraph (e)(3). The revised and added provisions read as follows:

§ 1.337(d)-1 Transitional loss limitation rule.

(a) * * *

(3) *Coordination with loss deferral and other disallowance rules.* For purposes of this section, the rules of § 1.1502-20(a)(3) apply, with appropriate adjustments to reflect differences

between the approach of this section and that of § 1.1502–20.

* * * * *

(5) * * *

Example 8. Deferred loss and recognized gain. (i) P is the common parent of a consolidated group, S is a wholly owned subsidiary of P, and T is a wholly owned subsidiary of S. S purchased all of the T stock on February 1, 1987 for $100, and T has an asset with a basis of $40 and a value of $100. T sells the asset for $100, recognizing $60 of gain. Under the investment adjustment system, S's basis in the T stock increases from $100 to $160. S sells its T stock to P for $100 in a deferred intercompany transaction, recognizing a $60 loss that is deferred under section 267(f) and § 1.1502–13(c). P subsequently sells all the stock of T for $100 to X, a member of the same controlled group (as defined in section 267(f)) as P but not a member of the P consolidated group.

(ii) Under paragraph (a)(3) of this section, the application of paragraph (a)(1) of this section to S's $60 loss is deferred, because S's loss is deferred under section 267(f) and § 1.1502–13(c). Although P's sale of the T stock to X would cause S's deferred loss to be taken into account under § 1.1502–13(f)(1)(iii), § 1.267(f)–2T(d)(2) provides that the loss is not taken into account because X is a member of the same controlled group as P and S. Nevertheless, under paragraph (a)(3) of this section, because the T stock ceases to be owned by a member of the P consolidated group, S's deferred loss is eliminated immediately before the sale and is never taken into account under section 267(f).

(iii) The facts are the same as in (i) of this Example, except that S is liquidated after its sale of the T stock to P, but before P's sale of the T stock to X. Section 1.267(f)–2T(d)(2) and § 1.267–1T(c)(6) and (7) provide that, because S liquidated while the T stock is still owned by P, S's $60 deferred loss is not restored to S. Instead, P's basis in the T stock is increased by the unrestored deferred loss, from $100 to $160. Because S's deferred loss is eliminated by section 267(f) before the occurrence of any of the events described in paragraph (a)(3) of this section, no deferred loss remains to be disallowed under paragraph (a)(1) of this section. However, P's $60 loss on its disposition of the T stock is disallowed under paragraph (a)(1) of this section, because it is attributable to the recognition of built-in gain by a transitional subsidiary on the disposition of an asset after January 6, 1987.

* * * * *

(b) * * *

(3) *Coordination with loss deferral and other disallowance rules.* For purposes of this section, the rules of § 1.1502–20(a)(3) apply, with appropriate adjustments to reflect differences between the approach of this section and that of § 1.1502–20.

* * * * *

(d) *Investment adjustments and earnings and profits*—(1) *In general.* For purposes of determining investment adjustments under § 1.1502–32 and earnings and profits under § 1.1502–33(c) with respect to a member of a consolidated group that owns stock in a subsidiary, any deduction that is disallowed under this section is treated as a loss arising and absorbed by the member in the tax year in which the disallowance occurs.

* * * * *

(e) *Effective dates*—(1) *General rule.* This section applies with respect to dispositions after January 6, 1987. For dispositions on or after November 19, 1990, however, this section applies only if the stock was deconsolidated (as that term is defined in § 1.337(d)–2(b)(2)) before November 19, 1990, and only to the extent the disposition is not subject to § 1.337(d)–2 or § 1.1502–20.

* * * * *

(3) *Application of § 1.1502–20T to certain transactions*—(i) *In general.* If a group files the certification described in paragraph (e)(3)(ii) of this section, it may apply § 1.1502–20T (as contained in the CFR edition revised as of April 1, 1990), to all of its members with respect to all dispositions and deconsolidations by the certifying group to which § 1.1502–20T otherwise applied by its terms occurring—

(A) On or after March 9, 1990 (but only if not pursuant to a binding contract described in § 1.337(d)–1T(e)(2) (as contained in the CFR edition revised as of April 1, 1990) that was entered into before March 9, 1990); and

(B) Before November 19, 1990 (or thereafter, if pursuant to a binding contract described in § 1.1502–20T(g)(3) that was entered into on or after March 9, 1990 and before November 19, 1990).

The certification under this paragraph (e)(3)(i) with respect to the application of § 1.1502–20T to any transaction described in this paragraph (e)(3)(i) may not be withdrawn and, if the certification is filed, § 1.1502–20T must be applied to all such transactions on all returns (including amended returns) on which such transactions are included.

(ii) *Time and manner of filing certification.* The certification described in paragraph (e)(3)(i) of this section must be made in a separate statement entitled "[insert name and employer identification number of common parent] hereby certifies under § 1.337(d)–1 (e)(3) that the group of which it is the common parent is applying § 1.1502–20T to all transactions to which that section otherwise applied by it terms." The statement must be signed by the common parent and filed with the group's income tax return for the taxable year of the first disposition or deconsolidation to which the certification applies. If the separate statement required under this paragraph (e)(3) is to be filed with a return the due date (including extensions) of which is before November 16, 1991, the statement may be filed with an amended return for the year of the disposition or deconsolidation that is filed within 180 days after September 13, 1991. Any other filings required under § 1.1502–20T, such as the statement required under § 1.1502–20T(f)(5), may be made with the amended return, regardless of whether § 1.1502–20T permits such filing by amended return.

Par. 4. Section 1.337(d)–2T is removed as of November 19, 1990, and new § 1.337(d)–2 is added to read as follows:

§ 1.337(d)–2 Loss limitation window period.

(a) *Loss disallowance*—(1) *General rule.* No deduction is allowed for any loss recognized by a member of a consolidated group with respect to the disposition of stock of a subsidiary.

(2) *Definitions.* For purposes of this section—

(i) The definitions in § 1.1502–1 apply.

(ii) *Disposition* means any event in which gain or loss is recognized, in whole or in part.

(3) *Coordination with loss deferral and other disallowance rules.* For purposes of this section, the rules of § 1.1502–20(a)(3) apply, with appropriate adjustments to reflect differences between the approach of this section and that of § 1.1502–20.

(b) *Basis reduction on deconsolidation* —(1) *General rule.* If the basis of a member of a consolidated group in a share of stock of a subsidiary exceeds its value immediately before a deconsolidation of the share, the basis of the share is reduced at that time to an amount equal to its value. If both a disposition and a deconsolidation occur with respect to a share in the same transaction, paragraph (a) of this section applies and, to the extent necessary to effectuate the purposes of this section, this paragraph (b) applies following the application of paragraph (a) of this section.

(2) *Deconsolidation.* "Deconsolidation" means any event that causes a share of stock of a subsidiary that remains outstanding to be no longer owned by a member of any consolidated group of which the subsidiary is also a member.

(3) *Value. Value* means fair market value.

(4) *Loss within 2 years after basis reduction*—(i) *In general.* If a share is deconsolidated and a direct or indirect disposition of the share occurs within 2 years after the date of the deconsolidation, a separate statement

entitled "statement pursuant to § 1.337(d)–2(b)(4)" must be filed with the taxpayer's return for the year of disposition. If the taxpayer fails to file the statement as required, no deduction is allowed for any loss recognized with respect to the disposition. If the separate statement is required to be filed with a return the due date (including extensions) of which is before January 16, 1991, or with a return due (including extensions) after January 15, 1991 but filed before that date, the statement may be filed with an amended return for the year of the disposition or with the taxpayer's first subsequent return the due date (including extensions) of which is after January 15, 1991. A disposition after the 2-year period described in this paragraph (b)(4) that is pursuant to an agreement, option, or other arrangement entered into within the 2-year period is treated as a disposition within the 2-year period for purposes of this section.

(ii) *Contents of statement.* The statement required under paragraph (b)(4)(i) of this section must contain—

(A) The name and employer identification number (E.I.N.) of the subsidiary.

(B) The amount of prior basis reduction with respect to the stock of the subsidiary under paragraph (b)(1) of this section.

(C) The basis of the stock of the subsidiary immediately before the disposition.

(D) The amount realized on the disposition.

(E) The amount of the loss recognized on the disposition.

(c) *Allowable loss*—(1) *Application.* This paragraph (c) applies with respect to stock of a subsidiary only if—

(i) Before February 1, 1990, the consolidated group either—

(A) Disposes (in one or more transactions) of its entire equity interest in the subsidiary to persons not related to any member of the consoldiated group within the meaning of section 267(b) or section 707(b)(1) (substituting "10 percent" for "50 percent" each place that it appears); or

(B) Sustains a worthless stock loss under section 165(g); and

(ii) A separate statement entitled "allowed loss under § 1.337(d)–2(c)" is filed in accordance with paragraph (c)(3) of this section.

(2) *General rule.* Loss is not disallowed under paragraph (a)(1) of this section and basis is not reduced under paragraph (b)(1) of this section to the extent the taxpayer extablishes that the loss or basis in not attributable to the recognition of built-in gain on the disposition of an asset (including stock and securities). Loss or basis may be attributable to the recognition of built-in gain on the disposition of an asset by a prior group. For purposes of this section, gain recognized on the disposition of an asset is built-in gain to the extent attributable, directly or indirectly, in whole or in part, to any excess of value over basis that is reflected, before the disposition of the asset, in the basis of the share, directly or indirectly, in whole or in part, after applying section 1503(e) and other applicable provisions of the Code and regulations.

(3) *Contents of statement and time of filing.* The statement required under paragraph (c)(1)(ii) of this section must be filed with the taxpayer's return for the year of the disposition or deconsolidation, and must contain—

(i) The name and employer identification number (E.I.N.) of the subsidiary.

(ii) The basis of the stock of the subsidiary immediately before the disposition or deconsolidation.

(iii) The amount realized on the disposition and the amount of fair market value on the deconsolidation.

(iv) The amount of the deduction not disallowed under paragraph (a)(1) of this section by reason of this paragraph (c) and the amount of basis not reduced under paragraph (b)(1) of this section by reason of this paragraph (c).

(v) The amount of loss disallowed under paragraph (a)(1) of this section and the amount of basis reduced under paragraph (b)(1) of this section.

If the separate statement is required to be filed with a return the due date (including extensions) of which is before January 16, 1991, or with a return due (including extensions) after January 15, 1991 but filed before that date, the statement may be filed with an amended return for the year of the disposition or deconsolidation or with the taxpayer's first subsequent return the due date (including extensions) of which is after January 15, 1991.

(4) *Example.* The principles of paragraphs (a), (b), and (c) of this section are illustrated by the examples in §§ 1.337(d)–1(a) and 1.1502–20(a) (other than *Examples 3, 4,* and *5*) and (b), with appropriate adjustments to reflect differences between the approach of this section and that of § 1.1502–20, and by the following example. For purposes of the examples in this section, unless otherwise stated, the group files consolidated returns on a calendar year basis, the facts set forth the only corporate activity, and all sales and purchases are with unrelated buyers or sellers. The basis of each asset is the same for determining earnings and profits adjustments and taxable income. Tax liability and its effect on basis, value, and earnings and profits are disregarded. "Investment adjustment system" means the rules of §§ 1.1502–32 and 1.1502–33(c).

Example. Loss offsetting built-in gain in a prior group. (i) P buys all the stock of T for $50 in Year 1, and T becomes a member of the P group. T has 2 assets. Asset 1 has a basis of $50 and a value of $0, and asset 2 has a basis of $0 and a value of $50. T sells asset 2 during Year 3 for $50, and recognizes a $50 gain. Under the investment adjustment system, P's basis in the T stock increases to $100 as a result of the recognition of gain. In year 5, all of the stock of P is acquired by the P1 group, and the former members of the P group become members of the P1 group. T then sells asset 1 for $0, and recognizes a $50 loss. Under the investment adjustment system, P's basis in the T stock decreases to $50 as a result of the loss. T's assets decline in value from $50 to $40. P then sells all the stock of T for $40 and recognizes a $10 loss.

(ii) P's basis in the T stock reflects both T's unrecognized gain and unrecognized loss with respect to its assets. The gain T recognizes on the disposition of asset 2 is built-in gain with respect to both the P and the P1 groups for purposes of paragraph (c)(2) of this section. In addition, the loss T recognizes on the disposition of asset 2 is built-in loss with respect to the P and P1 groups for purposes of paragraph (c)(2) of this section. T's recognition of the built-in loss while a member of the P1 group offsets the effect on T's stock basis of T's recognition of the built-in gain while a member of the P group. Thus, P's $10 loss on the sale of the T stock is not attributable to the recognition of built-in gain, and the loss is therefore not disallowed under paragraph (c)(2) of this section.

(iii) The result would be the same if, instead of having a $50 built-in loss in asset 2 when it becomes a member of the P group, T has a $50 net operating loss carryover and the carryover is used by the P group.

(d) *Successors.* For purposes of this section, the rules and examples of § 1.1502–20(d) apply, with appropriate adjustments to reflect differences between the approach of this section and that of § 1.1502–20.

(e) *Anti-avoidance rules.* For purposes of this section, the rules and examples of § 1.1502–20(e) apply, with appropriate adjustments to reflect differences between the approach of this section and that of § 1.1502–20.

(f) *Investment adjustments and earnings and profits.* For purposes of this section, the rules and examples of § 1.1502–20 (f) apply, with appropriate adjustments to reflect differences between the approach of this section and that of § 1.1502–20.

(g) *Effective dates*—(1) *General rule.* Except as otherwise provided in this paragraph (g), this section applies with respect to dispositions and deconsolidations on or after November

19, 1990, but only to the extent the disposition or deconsolidation is not subject to § 1.1502–20. For this purpose, dispositions deferred under §§ 1.1502–13, 1.1502–13T, 1.1502–14, and 1.1502–14T are deemed to occur at the time the deferred gain or loss is taken into account unless the stock was deconsolidated before November 19, 1990. If stock of a subsidiary became worthless during a taxable year including November 19, 1990, the disposition with respect to the stock is treated as occurring on the date the stock became worthless.

(2) *Binding contract rule.* For purposes of this paragraph (g), if a disposition or deconsolidation is pursuant to a binding written contract entered into before March 9, 1990, and in continuous effect until the disposition or deconsolidation, the date the contract became binding is treated as the date of the disposition or deconsolidation.

(3) *Application of § 1.1502–20T to certain transactions*—(i) *In general.* If a group files the certification described in paragraph (g)(3)(ii) of this section, it may apply § 1.1502–20T (as contained in the CFR edition revised as of April 1, 1990), to all of its members with respect to all dispositions and deconsolidations by the certifying group to which § 1.1502–20T otherwise applied by its terms occurring—

(A) On or after March 9, 1990 (but only if not pursuant to a binding contract described in § 1.337(d)–1T(e)(2) (as contained in the CFR edition revised as of April 1, 1990) that was entered into before March 9, 1990); and

(B) Before November 19, 1990 (or thereafter, if pursuant to a binding contract described in § 1.1502–20T(g)(3) that was entered into on or after March 9, 1990 and before November 19, 1990).

The certification under this paragraph (g)(3)(i) with respect to the application of § 1.1502–20T to any transaction described in this paragraph (g)(3)(i) may not be withdrawn and, if the certification is filed, § 1.1502–20T must be applied to all such transactions on all returns (including amended returns) on which such transactions are included.

(ii) *Time and manner of filing certification.* The certification described in paragraph (g)(3)(i) of this section must be made in a separate statement entitled "[insert name and employer identification number of common parent] hereby certifies under § 1.337(d)–2(g)(3) that the group of which it is the common parent is applying § 1.1502–20T to all transactions to which that section otherwise applied by its terms." The statement must be signed by the common parent and filed with the group's income tax return for the taxable year of the first disposition or deconsolidation to which the certification applies. If the separate statement required under this paragraph (g)(3) is to be filed with a return the due date (including extensions) of which is before November 16, 1991, the statement may be filed with an amended return for the year of the disposition or deconsolidation that is filed within 180 days after September 13, 1991. Any other filings required under § 1.1502–20T, such as the statement required under § 1.1502–20T(f)(5), may be made with the amended return, regardless of whether § 1.1502–20T permits such filing by amended return.

Par. 5. Section 1.1502–19 is amended as follows:

a. The text of paragraph (a)(6) is redesignated as paragraph (a)(6)(i);

b. A heading for redesignated (a)(6)(i) is added;

c. New paragraph (a)(6)(ii) is added;

d. The revised and added provisions read as follows:

§ 1.1502–19 Excess losses.

(a) * * *

(6) *Election to reduce basis of other investment*—(i) *In general.* * * *

(ii) *Limitation.* The basis of stock may not be reduced pursuant to an election under § 1.1502–19(a)(6)(i) to the extent the reduction has the effect of netting gain or loss in a manner that would not be permitted under § 1.1502–20(a)(4) and 1.1502–20(b)(4).

Par. 6. New § 1.1502–20 is added to read as follows:

§ 1.1502–20 Disposition or deconsolidation of subsidiary stock.

(a) *Loss disallowance*—(1) *General rule.* No deduction is allowed for any loss recognized by a member with respect to the disposition of stock of a subsidiary.

(2) *Disposition. Disposition* means any event in which gain or loss is recognized, in whole or in part.

(3) *Coordination with loss deferral and other disallowance rules*—(i) *In general.* Loss with respect to the stock of a subsidiary may be deferred or disallowed under other applicable provisions of the Code and regulations, including section 267(f). Paragraph (a)(1) of this section does not apply to loss that is disallowed under any other provision. If loss is deferred under any other provision, paragraph (a)(1) of this section applies when the loss is taken into account. However, if an overriding event described in paragraph (a)(3)(ii) of this section occurs before the deferred loss is taken into account, paragraph (a)(1) of this section applies to the loss immediately before the event occurs even though the loss may not be taken into account until a later time. Any loss not disallowed under paragraph (a)(1) of this section is subject to disallowance or deferral under other applicable provisions of the Code and regulations.

(ii) *Overriding events.* For purposes of paragraph (a)(3)(i) of this section, the following are overriding events—

(A) The stock ceases to be owned by a member of the consolidated group;

(B) The stock is cancelled or redeemed (regardless of whether it is retired or held as treasury stock); or

(C) The stock is disposed of within the meaning of § 1.1502–19(b)(2) (other than § 1.1502–19(b)(2)(ii)).

(4) *Netting.* Paragraph (a) (1) of this section does not apply to loss with respect to the disposition of stock of a subsidiary, to the extent that, as a consequence of the same plan or arrangement, gain is taken into account by members with respect to stock of the same subsidiary having the same material terms. If the gain to which this paragraph (a)(4) applies is less than the amount of the loss with respect to the disposition of the subsidiary's stock, the gain is applied to offset loss with respect to each share disposed of as a consequence of the same plan or arrangement in proportion to the amount of the loss deduction that would have been disallowed under paragraph (a)(1) of this section with respect to such share before the application of this paragraph (a)(4). If the same item of gain could be taken into account more than once in limiting the application of paragraphs (a)(1) and (b)(1) of this section, the item is taken into account only once. See § 1.1502–19(a)(6)(ii) for limits on the reduction of basis pursuant to an election under that section.

(5) *Examples.* For purposes of the examples in this section, unless otherwise stated, the group files consolidated returns on a calendar year basis, the facts set forth the only corporate activity, and all sales and purchases are with unrelated buyers or sellers. The basis of each asset is the same for determining earnings and profits adjustments and taxable income. Tax liability and its effect on basis, value, and earnings and profits are disregarded. "Investment adjustment system" means the rules of §§ 1.1502–32 and 1.1502–33(c). The principles of this paragraph (a) are illustrated by the following examples.

Example 1. Loss attributable to recognized built-it gain. P buys all the stock of T for $100, and T becomes a member of the P group. T has an asset with a basis of $0 and a value of $100. T sells the asset for $100. Under the

investment adjustment system, P's basis in the T stock increases to $200. Five years later, P sells all the T stock for $100 and recognizes a loss of $100. Under paragraph (a)(1) of this section, no deduction is allowed to P for the $100 loss.

Example 2. Effect of post-acquisition appreciation. P buys all the stock of T for $100, and T becomes a member of the P group. T has an asset with a basis of $0 and a value of $100. T sells the asset for $100. Under the investment adjustment system, P's basis in the T stock increases to $200. T reinvests the proceeds of the sale in an asset that appreciates in value to $180. Five years after the sale, P sells all the stock of T for $180 and recognizes a $20 loss. Under paragraph (a)(1) of this section, no deduction is allowed to P for the $20 loss.

Example 3. Disallowance of duplicated loss. P forms S with a contribution of $100 in exchange for all of the S stock, and S becomes a member of the P group. S has an operating loss of $60. The group is unable to use the loss, and the loss becomes a consolidated net operating loss carryover attributable to S. Five years later, P sells the stock of S for $40, recognizing a $60 loss. Under paragraph (a)(1) of this section, P's $60 loss on the sale of the S stock is disallowed. (See paragraph (g) of this section for the elective reattribution of S's $60 net operating loss to P in connection with the sale.)

Example 4. Deemed asset sale election. (i) P forms S with a contribution of $100 in exchange for all of the S stock, and S becomes a member of the P group. S buys an asset for $100, and the value of the asset declines to $40. P sells all the S stock to P1 for $40. Under paragraph (a)(1) of this section, P's $60 loss on the sale of the S stock is disallowed.

(ii) If P and P1 instead elect deemed asset sale treatment under section 338 (h) (10), S is treated as selling all of its assets, and no loss is recognized by P on its sale of the S stock. As a result of the recharacterization of the stock sale as an asset sale, the $60 loss in the asset is recognized. Under section 338 (h)(10), S's $60 loss is included in the consolidated return of the P group, and S is treated as liquidating into P under section 332 following the deemed asset sale. Paragraph (a)(1) of this section does not apply to S's $60 loss.

Example 5. Gain and loss recognized with respect to stock as a consequence of the same plan or arrangement. P, the common parent of a group, owns 50 shares of the stock of T with an aggregate basis of $50, and S, a wholly owned subsidiary of P, owns the remaining 50 shares of T's stock with an aggregate basis of $100. All of the stock has the same terms. P and S sell all the T stock to the public for $140 pursuant to a single public offering. P therefore recognizes a gain of $20 and S recognizes a loss of $30. For purposes of paragraph (a)(4) of this section, the gain and loss recognized by P and S is considered to be a consequence of the same plan or arrangement. Accordingly, the amount of S's $30 loss disallowed under paragraph (a)(1) of this section is limited to $10 (the $30 reduced by P's $20 gain).

Example 6. Deferred loss and recognized gain. (i) P is the common parent of a consolidated group. S is a wholly owned subsidiary of P, and T is a recently purchased, wholly owned subsidiary of S. S has a $100 basis in the T stock, and T has an asset with a basis of $40 and a value of $100. T sells the asset for $100, recognizing a $60 gain. Under the investment adjustment system, S's basis in the T stock increases from $100 to $160. S sells its T stock to P for $100 in a deferred intercompany transaction, recognizing a $60 loss that is deferred under section 267(f) and § 1.1502–13 (c). P subsequently sells all the stock of T for $100 to X, a member of the same controlled group (as defined in section 267(f)) as P but not a member of the P consolidated group.

(ii) Under paragraph (a)(3) of this section, the application of paragraph (a)(1) of this section to S's $60 loss is deferred, because S's loss is deferred under section 267(f) and § 1.1502–13(c). Although P's sale of the T stock to X would cause S's deferred loss to be taken into account under § 1.1502–13(f)(1)(iii), § 1.267(f)–2T (d)(2) provides that the loss is not taken into account because X is a member of the same controlled group as P and S. Nevertheless, under paragraph (a)(3) of this section, because the T stock ceases to be owned by a member of the P consolidated group, S's deferred loss is eliminated immediately before the sale and is never taken into account under section 267(f).

(iii) The facts are the same as in (i) of this *Example,* except that S is liquidated after its sale of the T stock to P, but before P's sale of the T stock to X. Section 1.267(f)–2T(d)(2) and § 1.267–1T(c)(6) and (7) provide that, because S is liquidated while the T stock is still owned by P, S's $60 deferred loss is not restored to S. Instead, P's basis in the T stock is increased by the unrestored deferred loss, from $100 to $160. Because S's deferred loss is eliminated by section 267 (f) before the occurrence of any of the events described in paragraph (a)(3) of this section, no deferred loss remains to be disallowed under paragraph (a)(1) of this section. However, P's $60 loss on its disposition of the T stock is disallowed under paragraph (a)(1) of this section, because its $60 of earnings and profits from extraordinary gain dispositions are indirectly reflected immediately before the disposition in the basis of the T stock.

(b) *Basis reduction on deconsolidation*—(1) *General rule.* If a member's basis in a share of stock of a subsidiary exceeds its value immediately before a deconsolidation of the share, the basis of the share is reduced at that time to an amount equal to its value. If both a disposition and a deconsolidation occur with respect to a share in the same transaction, paragraph (a) of this section applies and, to the extent necessary to effectuate the purposes of this section, this paragraph (b) applies following the application of paragraph (a) of this section.

(2) *Deconsolidation.* Deconsolidation means any event that causes a share of stock of a subsidiary that remains outstanding to be no longer owned by a member of any consolidated group of which the subsidiary is also a member.

(3) *Value. Value* means fair market value.

(4) *Netting.* Paragraph (b)(1) of this section does not apply to reduce the basis of stock of a subsidiary, to the extent that, as a consequence of the same plan or arrangement as that giving rise to the deconsolidation, gain is taken into account by members with respect to stock of the same subsidiary having the same material terms. If the gain to which this paragraph (b)(4) applies is less than the amount of basis reduction with respect to shares of the subsidiary's stock, the gain is applied to offset basis reduction with respect to each share deconsolidated as a consequence of the same plan or arrangement in proportion to the amount of the reduction that would have been required under paragraph (b)(1) of this section with respect to such share before the application of this paragraph (b)(4). If the same item of gain could be taken into account more than once in limiting the application of paragraphs (a)(1) and (b)(1) of this section, the time is taken into account only once. See § 1.1502–19(a)(6)(ii) for limits on the reduction of basis pursuant to an election under that section.

(5) *Loss within 2 years after basis reduction*—(i) *In general.* If a share is deconsolidated and a direct or indirect disposition of the share occurs within 2 years after the date of the deconsolidation, a separate statement entitled "Statement Pursuant to Section § 1.1502–20(b)(5)" must be filed with the taxpayer's return for the year of disposition. If the taxpayer fails to file the statement as required, no deduction is allowed for any loss recognized with respect to the disposition. A disposition after the 2-year period described in this paragraph (b)(5) that is pursuant to an agreement, option, or other arrangement entered into within the 2-year period is treated as a disposition within the 2-year period for purposes of this section.

(ii) *Contents of statement.* The statement required under paragraph (b)(5)(i) of this section must contain—

(A) The name and employer identification number (E.I.N.) of the subsidiary.

(B) The amount of prior basis reduction (if any) with respect to the stock of the subsidiary under paragraph (b)(1) of this section.

(C) The basis of the stock of the subsidiary immediately before the disposition.

(D) The amount realized on the disposition.

(E) The amount of the loss recognized on the disposition.

(6) *Examples.* The principles of this paragraph (b) are illustrated by the following examples.

Example 1. Simultaneous application of loss disallowance rule and basis reduction rule to stock of the same subsidiary. (i) P buys all the stock of T for $100, and T becomes a member of the P group. T has an asset with a basis of $0 and a value of $100. T sells the asset for $100. Under the investment adjustment system, P's basis in the T stock increases to $200. Five years later, P sells 60 shares of T stock for $60 and recognizes $60 loss on the sale. The sale causes a deconsolidation of the remaining 40 shares of T stock held by P.

(ii) P's $60 loss on the sale of T stock is disallowed under paragraph (a)(1) of this section. Under paragraph (b)(1) of this section, P must reduce the basis of the 40 shares of T stock it continues to own from $80 to $40, the value of the shares immediately before the deconsolidation.

(iii) Although P's disposition of the 60 shares also causes a deconsolidation of these shares, paragraph (b)(1) of this section provides that, if both paragraph (a) and paragraph (b) of this section apply to a share in the same transaction, paragraph (a) of this section applies first and this paragraph (b) applies only to the extent necessary to effectuate the purposes of this section. Under paragraph (a)(1) of this section, P's $60 loss on the sale of the 60 shares is disallowed. Under the facts of this example, it is not necessary to also apply this paragraph (b) to the 60 shares in order to effectuate the purposes of this section.

Example 2. Deconsolidation of subsidiary stock on contribution to a partnership. (i) P buys all the stock of T for $100, and T becomes a member of the P group. T has an asset with a basis of $0 and a value of $100. T sells the asset for $100. Under the investment adjustment system, P's basis in the T stock increases to $200. Five years later, P transfers all the stock of T to partnership M in exchange for a partnership interest in M, in a transaction to which section 721 applies.

(ii) At the time of the exchange, P's basis in the T stock is $200 and the T stock's value is $100. Under paragraph (b) of this section, the transfer to M causes a deconsolidation of the T stock, and P must reduce its basis in the T stock, immediately before the transfer to M, from $200 to the stock's $100 value at the time of the transfer. As a result, P has a basis of $100 in its interest in M, and M has a basis of $100 in the stock of T.

Example 3. Simultaneous application of loss disallowance and basis reduction to stock of different subsidiaries. (i) P owns all the stock of S, which in turn owns all the stock of S1, and S and S1 are members of the P group. P's basis in the S stock is $100 and S's basis in the S1 stock is $100. S1 buys all the stock of T for $100, and T becomes a member of the P group. T has an asset with a basis of $0 and a value of $100. T sells the asset for $100. Under the investment adjustment system, S1's basis in the T stock, S's basis in the S1 stock, and P's basis in the S stock each increase from $100 to $200. S then sells all the S1 stock for $100 and recognizes a loss of $100.

(ii) Under paragraph (a)(1) of this section, S's $100 loss on the sale of the S1 stock is disallowed.

(iii) If S1 and T are not members of a consolidated group immediately after the sale of the stock of S1, the T stock is deconsolidated and, under paragraph (b)(1) of this section, S1 must reduce the basis of the T stock to its $100 value immediately before the sale.

(iv) If S1 and T are members of a consolidated group immediately after the sale of the S1 stock, the T stock is not deconsolidated, and no reduction is required under paragraph (b)(1) of this section.

Example 4. Extending the time period for dispositions. (i) In Year 1, P, the common parent of a group, buys all 100 shares of the stock of T for $100. T's only asset has a basis of $0 and a value of $100. T sells the asset for $100. Under the investment adjustment system, P's basis in the T stock increases from $100 to $200. At the beginning of Year 5, P causes T to issue 30 additional shares of stock to the public for $30. This issuance causes a deconsolidation of the T stock owned by P, and paragraph (b)(1) of this section requires P to reduce its basis in the T stock from $200 to $100.

(ii) Within 2 years after the date of the basis reduction, P agrees to sell all of its T stock for $90 at the end of Year 7. Under paragraph (b)(5) of this section, P's disposition of the T stock at the end of Year 7 is treated as occurring within the 2-year period following the basis reduction, because the disposition is pursuant to an agreement reached within 2 years after the basis reduction. Accordingly, P's $10 loss may not be deducted unless P files the statement required under paragraph (b)(5) of this section. This result is reached whether or not the agreement is in writing. P's disposition would also have been treated as occurring within the 2-year period if the disposition were pursuant to an option issued within the period.

Example 5. Deferred loss and subsequent basis reduction. (i) P is the common parent of a consolidated group, S is a wholly owned subsidiary of P, and T is a recently purchased, wholly owned subsidiary of S. S has a $100 basis in the T stock, and T has an asset with a basis of $40 and a value of $100. T sells the asset for $100, recognizing $60 of gain. Under the investment adjustment system, S's basis in the T stock increases from $100 to $160. S sells its T stock to P for $100 in a deferred intercompany transaction and its $60 loss is deferred under section 267(f) and § 1.1502–13(c). T issues 30 additional shares of stock to the public for $30 which causes a deconsolidation of the T stock owned by P.

(ii) Because the fair market value of the T stock owned by P is $100 immediately before the deconsolidation and P has a $100 basis in the stock at that time, no basis reduction is required under paragraph (b)(1) of this section.

(iii) Under § 1.1502–13T(l), loss deferred with respect to stock sold in an intercompany transaction is generally taken into account in an amount equal to the decrease for the taxable year in the stock's basis recovery that is attributable to the intercompany transaction. If S had not sold its T stock to P, paragraph (b)(1) of this section would have reduced the basis of the shares by $60. The basis reduction required under paragraph (b)(1) of this section is a basis recovery for purposes of § 1.1502–13T(l), and the deferred intercompany transaction has reduced this basis recovery from $60 to $0. Thus, S's $60 deferred loss is taken into account immediately before the deconsolidation.

(iv) Under paragraph (a)(3) of this section, the application of paragraph (a)(1) of this section to S's $60 loss was deferred at the time of the sale to P because S's loss was deferred under section 267(f) and § 1.1502–13(c). However, the deconsolidation of the T stock is an overriding event under paragraph (a)(3)(ii) of this section and § 1.1502–19(b)(2)(i), and paragraph (a)(1) of this section applies to the loss immediately before the deconsolidation, even though the loss is not taken into account at that time.

Example 6. Gain and basis reduction with respect to the same plan or arrangement. (i) P, the common parent of a group, owns 50 shares of T stock with an aggregate basis of $50, and S, a wholly owned subsidiary of P, owns the remaining 50 shares of T stock with an aggregate basis of $100. All of the stock has the same terms. P sells all of its T stock to the public for $70 and recognizes a $20 gain. The sale causes a deconsolidation of S's 50 shares of T stock.

(ii) Under paragraph (b)(1) of this section, S must reduce the basis of its 50 shares of T stock from $100 to $70, the value of the shares immediately before the deconsolidation. However, under paragraph (b)(4) of this section, because P's $20 gain is recognized as a consequence of the same plan or arrangement as that giving rise to the deconsolidation, S's basis reduction is eliminated to the extent of $20. Thus, S must reduce the basis of its T stock from $100 to $90.

Example 7. Netting allocated between loss disallowance and basis reduction. (i) P is the common parent of a group and S is its wholly owned subsidiary. P and S each own 50 shares of T stock and each has an aggregate basis of $50. All of the stock has the same terms. S recently purchased its T stock from S1, a lower tier subsidiary, in a deferred intercompany transaction in which S1 recognized a $30 gain that was deferred under § 1.1502–13(c). T has an asset with a basis of $0 and a value of $100. T sells the asset for $100, recognizing $100 of gain. Under the investment adjustment system, P and S each increase the basis of their T stock to $100. S sells all of its T stock to the public for $50 and recognizes a $50 loss. The sale causes a deconsolidation of P's T stock.

(ii) S's $50 loss on the sale of T stock is disallowed under paragraph (a)(1) of this section. Under paragraph (b)(1) of this section, P must reduce its $100 basis in the T stock to the $50 value immediately before the deconsolidation.

(iii) Under § 1.1502–13T(l), the sale of S's T stock causes S1's $30 deferred gain to be taken into account. Under paragraphs (a)(4) and (b)(4) of this section, the gain may be taken into account by P and S in limiting the application of paragraphs (a)(1) and (b)(1) of

this section, but it may be taken into account only once. Under paragraph (a)(4) of this section, S may apply the gain to decrease the amount of loss disallowed under paragraph (a)(1) of this section from $50 to $20. None of the gain remains to decrease the $50 of P's basis reduction under paragraph (b)(1) of this section. (P may instead apply the gain to decrease the basis reduction under paragraph (b)(1) of this section instead of S decreasing its disallowed loss, but if the T stock is sold within 2 years, the statement described in paragraph (b)(5) of this section must be filed if a deduction is to be allowed for any loss recognized on the disposition.)

(c) *Allowable loss*—(1) *General rule.* The amount of loss disallowed under paragraph (a)(1) of this section and the amount of basis reduction under paragraph (b)(1) of this section with respect to a share of stock shall not exceed the sum of the following amounts—

(i) *Extraordinary gain dispositions.* The share's allocable part of any member's earnings and profits, net of directly related expenses, from extraordinary gain dispositions.

(ii) *Positive investment adjustments.* Earnings and profits that result in adjustments with respect to the share under § 1.1502–32 (b)(1)(i) and (c)(1), but only to the extent the amount of these earnings and profits for a taxable year exceeds the amount described in paragraph (c)(1)(i) of this section for the same taxable year.

(iii) *Duplicated loss.* The amount of duplicated loss with respect to the share.

(2) *Operating rules.* For purposes of applying paragraph (c)(1) of this section—

(i) *Extraordinary gain dispositions.* An "extraordinary gain disposition" is—

(A) An actual or deemed disposition of—

(*1*) A capital asset as defined in section 1221 (determined without the application of any other provision of the Code or regulations).

(*2*) Property used in a trade or business as defined in section 1231(b) (determined without the application of any holding period requirement).

(*3*) An asset described in section 1221 (1), (3), (4), or (5), if substantially all the assets in such category from the same trade or business are disposed of in one transaction (or series of related transactions).

(*4*) Assets disposed of in an applicable asset acquisition under section 1060(c).

(B) A change in method of accounting resulting in a positive section 481 adjustment.

(C) A discharge of indebtedness.

(D) Any other event (or item) identified by the Commissioner in revenue rulings and revenue procedures.

An extraordinary gain disposition is taken into account under paragraph (c)(1)(i) of this section only if it occurs on or after November 19, 1990 and results in income or gain for purposes of computing earnings and profits (determined net of directly related expenses). For this purpose, federal income taxes may be directly related to extraordinary gain dispositions only to the extent of the excess (if any) of the group's income tax liability actually imposed under subtitle A of the Internal Revenue Code for the taxable year of the extraordinary gain dispositions over the group's income tax liability for the taxable year redetermined by not taking into account the extraordinary gain dispositions. For this purpose, the group's income tax liability actually imposed and its redetermined income tax liability are determined without taking into account the foreign tax credit under section 27(a) of the Code.

(ii) *Positive investment adjustments.* For purposes of paragraph (c)(1)(ii) of this section, earnings and profits are treated as resulting in adjustments under § 1.1502–32 (b)(1)(i) and (c)(1) with respect to a share if they would have resulted in such adjustments but for distributions with respect to the share. If the adjustments with respect to a share are modified pursuant to § 1.1502–32(c)(3), the adjustments taken into account under paragraph (c)(1)(ii) of this section must be appropriately modified.

(iii) *Applicable earnings and profits.* Earnings and profits are described in paragraphs (c)(1) (i) and (ii) of this section only to the extent they are reflected in the basis of the share, directly or indirectly, immediately before the disposition or deconsolidation, after applying section 1503(e), § 1.1502–32(g), and other applicable provisions of the Code and regulations.

(iv) *Related party rule.* The amounts described in paragraphs (c)(1) (i) and (ii) of this section are not reduced or eliminated by reason of an acquisition of the share from a person related within the meaning of section 267(b) or section 707(b)(1), substituting "10 percent" for "50 percent" each place that it appears, even if the share is not transferred basis property as defined in section 7701 (a)(43).

(v) *Pre-September 13, 1991 positive investment adjustments.* The amount determined under paragraph (c)(1)(ii) of this section for all taxable years ending on or before September 13, 1991 (or such earlier taxable year determined under paragraph (c)(2)(v)(B)(*1*) of this section) is limited to the net increase, if any, in the basis of the share from—

(A) The date—

(*1*) The share was first acquired by a member (whether or not a member at that time), or

(*2*) If the share is transferred basis property (within the meaning of section 7701(a)(43)) from a prior consolidated group, the share was first acquired by a member of the prior group, to

(B) The earlier of—

(*1*) The end of any taxable year ending after December 31, 1986 and on or before [September 13, 1991] (whichever such year end produces the lowest net increase), or

(*2*) The date of disposition or deconsolidation of the share.

(vi) *Duplicated loss.* "Duplicated loss" is determined immediately after a disposition or deconsolidation, and equals the excess (if any) of—

(A) The sum of—

(*1*) The aggregate adjusted basis of the assets of the subsidiary other than any stock and securities that the subsidiary owns in another subsidiary, and

(*2*) Any losses attributable to the subsidiary and carried to the subsidiary's first taxable year following the disposition or deconsolidation, and

(*3*) Any deferred deductions (such as deductions deferred under section 469) of the subsidiary, over

(B) The sum of—

(*1*) The value of the subsidiary's stock, and

(*2*) Any liabilities of the subsidiary, and

(*3*) Any other relevant items.

The amounts determined under this paragraph (c)(2)(vi) with respect to a subsidiary include its allocable share of corresponding amounts with respect to all lower tier subsidiaries. If 80 percent or more in value of the stock of a subsidiary is acquired by purchase in a single transaction (or in a series of related transactions during any 12-month period), the value of the subsidiary's stock may not exceed the purchase price of the stock divided by the percentage of the stock (by value) so purchased. For this purpose, stock is acquired by purchase if the transferee is not related to the transferor within the meaning of sections 267(b) and 707(b)(1), substituting "10 percent" for "50 percent" each place that it appears, and the transferee's basis in the stock is determined wholly by reference to the consideration paid for such stock.

(3) *Statement of allowed loss.* Paragraph (c)(1) of this section applies only if the separate statement required under this paragraph (c)(3) is filed with the taxpayer's return for the year of the disposition or deconsolidation. The statement must be entitled "ALLOWED

LOSS UNDER SECTION 1.1502–20(c)" and must contain—

(i) The name and employer identification number (E.I.N.) of the subsidiary.

(ii) The basis of the stock of the subsidiary immediately before the disposition or deconsolidation.

(iii) The amount realized on the disposition and the amount of fair market value on the deconsolidation.

(iv) The amount of the deduction not disallowed under paragraph (a)(1) of this section by reason of this paragraph (c) and the amount of basis not reduced under paragraph (b)(1) of this section by reason of this paragraph (c).

(v) The amount of loss disallowed under paragraph (a)(1) of this section and the amount of basis reduced under paragraph (b)(1) of this section.

(4) *Examples.* For purposes of the examples in this paragraph, unless otherwise stated, the group files the statement required under paragraph (c)(3) of this section. The principles of this paragraph (c) are illustrated by the following examples.

Example 1. Allowed loss attributable to lost built-in gain. (i) Individual A forms T. P buys all the stock of T from A for $100, and T becomes a member of the P group. T has a capital asset with a basis of $0 and a value of $100. The value of the asset declines, and T sells the asset for $40. Under the investment adjustment system, P's basis in the T stock increases to $140. P then sells all the stock of T for $40 and recognizes a loss of $100.

(ii) The amount of the $100 loss disallowed under paragraph (a)(1) of this section may not exceed the amount determined under paragraph (c)(1) of this section. The $40 of T's earnings and profits is from an extraordinary gain disposition, as defined in paragraph (c)(2)(i) of this section, and is reflected, within the meaning of paragraph (c)(2)(iii) of this section, in the basis of the T stock immediately before the disposition. The earnings and profits are therefore described in paragraph (c)(1)(i) of this section. Because this amount is the only amount described in paragraph (c)(1) of this section, the amount of P's $100 loss that is disallowed under paragraph (a)(1) of this section is limited to $40. (No amount is described in paragraph (c)(1) (ii) of this section because the amount of T's positive investment adjustments does not exceed the amount included under paragraph (c)(1)(i) of this section.)

(iii) The results would be the same if the asset, instead of being owned by T, is owned by a partnership in which T is a partner and T is allocated the $40 of gain pursuant to section 704(b). The $40 gain represents earnings and profits from an extraordinary gain disposition, as defined in paragraph (c)(2)(i) of this section, and is reflected in the basis of the T stock immediately before the disposition, as required under paragraph (c)(2)(iii) of this section.

Example 2. Extraordinary gain dispositions. (i) Individual A forms T. P buys all the stock of T from A for $100 in Year 1, and T becomes a member of the P group. T owns a capital asset, asset 1, with a basis of $0 and a value of $100. T sells asset 1 for $100 in Year 1 and invests the proceeds in a trade or business asset, asset 2. During Year 2, asset 2 produces $30 of gross operating income and $20 of cost recovery deductions. At the end of Year 2, asset 2 has an $80 adjusted basis and T disposes of asset 2 for $85; however, because T incurs $20 of expenses directly related to the sale of asset 2, the disposition produces a $15 loss for computing earnings and profits (this loss offsets T's $10 of operating income in Year 2, as well as $5 of operating income of P in that year). Under the investment adjustment system, P's basis in the T stock increases by $95, to $195, because T has $110 of earnings and a $15 loss. P sells the T stock for $95 in Year 5 and recognizes a $100 loss.

(ii) The $100 of earnings and profits from the disposition of asset 1 is from an extraordinary gain disposition, as defined in paragraph (c)(2)(i) of this section, and is reflected, within the meaning of paragraph (c)(2)(iii) of this section, in the basis of the T stock immediately before the disposition. The earnings and profits are therefore described in paragraph (c)(1)(i) of this section. The sale of asset 2 is not an extraordinary gain disposition because, under paragraph (c)(2)(i) of this section, that sale did not result in income or gain when determined net of directly related expenses. (No amount is described under paragraph (c)(1)(ii) of this section because T does not have any positive investment adjustments in excess of the amount included under paragraph (c)(1)(i) of this section.) Because the $100 amount described under paragraph (c)(1)(i) of this section equals P's $100 loss from the disposition of T stock, all of the loss is disallowed.

Example 3. Positive investment adjustments. (i) Individual A forms T. S, a member of the P group, buys all the stock of T from A for $100, and T becomes a member of the P group. T has an asset with a basis of $0 and a value of $100. The asset earns $100 of operating income in Year 1 and declines in value to $0. T invests the operating income in another asset which produces a $25 operating deficit during Year 2. Under the investment adjustment system, S's basis in the T stock increases to $200 at the end of Year 1, and decreases to $175 at the end of Year 2. S sells all the stock of T for $75 in Year 5 and recognizes a loss of $100.

(ii) The $100 of earnings and profits from operations in Year 1 is earnings and profits described in paragraph (c)(1)(ii) of this section. This amount is not reduced by the $25 deficit from operations in Year 2. Because the $100 amount described under paragraph (c)(1)(ii) of this section equals S's $100 loss from the disposition of T stock, all of the loss is disallowed.

(iii) Under paragraph (c)(2)(iv) of this section, the result would have been the same if, prior to the decline in the value of the first asset (the value of the T stock was $200, $100 cash and a $100 asset), S had sold the T stock to P for $200 at no gain or loss, and P then sold the T stock to the unrelated buyer for $75 (after the $100 decline in the value of the asset and the $25 operating deficit) and recognized a $100 loss. T had $100 of earnings and profits that resulted in investment adjustments under the investment adjustment system and are reflected, within the meaning of paragraph (c)(2)(iii) of this section, in the basis of the T stock. The earnings and profits and investment adjustments with respect to the T stock are not reduced or eliminated for purposes of paragraphs (c)(1)(ii) of this section by reason of P's purchase of the stock, because P is a person related to S within the meaning of section 267(b).

Example 4. Treatment of net operating income as attributable to built-in gain. (i) Individual A forms T. P buys all the stock of T from A for $100, and T becomes a member of the P group. T has a capital asset with a basis of $0 and a value of $100. The asset declines in value to $40. The asset earns $100 of operating income unrelated to its $60 decline in value. Under the investment adjustment system, P's basis in the T stock increases to $200. P then sells all the stock of T for $140 (the asset worth $40 and $100 cash) and recognizes a loss of $60.

(ii) The $100 adjustment to the basis of the T stock is an amount described in paragraph (c)(1)(ii) of this section. Because this amount exceeds the amount of loss otherwise disallowed under paragraph (a)(1) of this section, P's entire $60 loss from the disposition of T stock is disallowed.

Example 5. Carryover basis transactions—amounts attributable to separate return years. (i) Individual A forms T. S purchases all the stock of T from A for $100, and T becomes a member of the S group. T has a capital asset with a basis of $0 and a value of $100. T sells the asset for $100. Under the investment adjustment system, S's basis in the T stock increases to $200. P buys all of the stock of S for $100, and both S and T become members of the P group. S then sells the T stock for $100 and recognizes a loss of $100.

(ii) Under paragraph (c)(2)(iii) of this section, the $100 adjustment to S's basis in the T stock while a member of the S group is an amount described in paragraph (c)(1)(i) of this section with respect to the P group because it continues to be reflected in the basis of the T stock immediately before the stock is disposed of. Because this amount equals the loss otherwise disallowed under paragraph (a)(1) of this section, S's $100 loss from the disposition of T stock is disallowed.

Example 6. Cost basis for subsidiary stock. (i) In Year 1, individual A forms T. T's assets appreciate in value from $0 to $100, and T recognizes $100 of gain in an extraordinary gain disposition. T reinvests the sale proceeds in assets that appreciate in value to $150. In Year 3, A sells all of the T stock to P for $150, and T becomes a member of the P group. While a member of the P group, T's assets decline in value to $130 and P sells the T stock in Year 7 for $130 and recognizes a $20 loss.

(ii) Although T has $100 of earnings and profits from extraordinary gain dispositions, the earnings and profits are not reflected, within the meaning of paragraph (c)(2)(iii) of this section, in P's basis in the T stock. P's basis in the T stock reflects the stock's value at the time of P's purchase, and is determined without regard to whether T recognized the

earnings and profits before the purchase. Thus, no part of T's earnings and profits are described in paragraph (c)(1) of this section, and no part of the $20 loss is disallowed under paragraph (a) of this section. (For rules that apply if A and P are related persons, see paragraph (c)(2)(iv) of this section.)

Example 7. Adjustments to stock basis under applicable provisions of the Code and regulations. (i) Individual A forms T. P buys all the stock of T from A for $100, and T becomes a member of the P group. T has indebtedness of $300. After T becomes a member of the P group, T's assets decline in value and T's creditors agree to discharge $200 of T's indebtedness. However, pursuant to section 108(a), the $200 discharge is not included in the P group's gross income. Moreover, no attributes are reduced under section 108(b). Following the discharge, P disposes of its T stock for $0.

(ii) The $200 discharge of indebtedness is included in T's earnings and profits and, under § 1.1502–32(b)(1)(i), P's basis in the T stock is increased from $100 to $300. Under paragraph (c)(2)(i) of this section, this discharge is an extraordinary gain disposition for purposes of paragraph (c)(1)(i) of this section.

(iii) However, in determining the P group's loss on the disposition of the T stock, section 1503(e) excludes the $200 discharge of indebtedness from T's earnings and profits and P's loss on the disposition is $100 rather than $300. Thus, for purposes of paragraph (c)(2)(iii) of this section, T's earnings and profits from the discharge of indebtedness are not reflected in the stock basis, directly or indirectly, immediately before the disposition. Consequently, when P disposes of the T stock, T's earnings and profits for purposes of paragraphs (c)(1)(i) and (ii) of this section are $0, and P's $100 loss on the disposition is not disallowed under paragraph (a) of this section.

Example 8. Duplicated loss. (i) Individual A forms T with a contribution of $100 in exchange for all of the T stock. Individual B forms T1 with a contribution of land that has a $90 basis and $100 value. T buys all the stock of T1 from B for $100. P buys all the stock of T from A for $100, and both T and T1 become members of the P group. The value of T1's land declines to $40. P sells all of the T stock for $40 and recognizes a loss of $60.

(ii) Under paragraph (c)(1)(iii) of this section, P's amount of duplicated loss is $50. This is computed under paragraph (c)(2)(vi) of this section immediately after the disposition as the excess of—

(A) The $90 aggregate adjusted basis of the assets of T and T1 (other than stock and securities of T1 owned by T), over

(B) The $40 fair market value of the T stock (determined under paragraph (c)(2)(vi) of this section). Because this amount is the only amount described in paragraph (c)(1) of this section, the amount of P's $60 loss disallowed under paragraph (a)(1) of this section is limited to $50.

(iii) The result would be the same if the value of T1's property did not decline and T1 instead had an operating loss of $60 (attributable to borrowed funds) which the P group was unable to use. In that case, the $50 excess of the sum of—

(A) The $90 aggregate adjusted basis of the assets of T and T1 (other than stock and securities of members of the P group), plus the $60 net operating loss attributable to T1 and carried to its first taxable year following the disposition, over

(B) The sum of the $40 fair market value of the T stock, plus the $60 of T1 liabilities, is an amount described in paragraph (c)(2)(vi) of this section. (See paragraph (g) of this section for the elective reattribution of T1's $60 net operating loss to P in connection with the sale.)

(d) *Successors*—(1) *General rule.* This section applies, to the extent necessary to effectuate the purposes of this section, to any property the basis of which is determined, directly or indirectly, in whole or in part, by reference to the basis of a subsidiary's stock.

(2) *Examples.* The principles of this paragraph (d) are illustrated by the following examples.

Example 1. Status of successor as member. (i) P, the common parent of a group, buys all the stock of T for $100. T's only asset has a basis of $0 and a value of $100. T sells the asset for $100, and buys another asset for $100. Under the investment adjustment system, P's basis in the T stock increases to $200, and the earnings and profits of P increase by $100. P later transfers all the stock of T to an unrelated consolidation group in exchange for 10 percent of the stock of X, the common parent of that group, in a transaction described in section 368(a)(1)(B). At the time of the exchange, the value of the X stock received by P is $80.

(ii) Under section 358, P has a basis of $200 in the X stock it receives in exchange for T. Under section 362, X has a $200 basis in the T stock.

(iii) Neither paragraph (a)(1) nor (b)(1) of this section applies to the stock of T on P's transfer of the stock to the X group, because no gain or loss is recognized on the transfer, and the transfer is not a deconsolidation of the stock of T under paragraph (b)(2) of this section.

(iv) The X stock owned by P after the reorganization is a successor interest to the T stock because P's basis in the X stock is determined by reference to P's basis in the T stock. The purposes of this section require that the reorganization exchange be treated as a deconsolidation event with respect to P's interest in the X stock. Because X is not a member of the P group, a failure to reduce the basis of the X stock owned by P to its fair market value would permit the P group to recognize and deduct the loss attributable to the T stock. However, because T is a member of the X group, a reduction in the basis of the T stock is not necessary to prevent the X group from recognizing and deducting the loss arising in the P group. The transfer of T stock to X therefore constitutes a deconsolidation of the X stock but not the T stock. Therefore, P must reduce its basis in the X stock from $200 to its $80 value at that time. However, X's basis in the T stock remains $200.

Example 2. Continued application after deconsolidation. (i) P, the common parent of a group, buys all the stock of T for $100. T's only asset has a basis of $0 and a value of $100. T sells the asset for $100, and buys another asset for $100. Under the investment adjustment system, P's basis in the T stock increases to $200. P later transfers all the stock of T to partnership M in exchange for a partnership interest in M, in a transaction to which section 721 applies. The value of the T stock immediately before the transfer to M is $100. Less than 2 years later, P sells its interest in M for $80.

(ii) Under paragraph (b)(1) of this section, because the stock of T is deconsolidated on the transfer to M, immediately before the transfer to M, P reduces its basis in the T stock to the stock's $100 value immediately before the transfer. As a result, P has a basis of $100 in its interest in M, and M has a basis of $100 in the T stock.

(iii) When P sells its interest in M for $80, it recognizes a $20 loss. Because the basis of P's interest in M is determined by reference to P's basis in the T stock, and the reporting requirements could otherwise be circumvented, P's partnership interest in M is a successor interest to the T stock. Under paragraph (b)(5) of this section, P is required to file a statement with its return for the year of its disposition of its interest in M in order to deduct its loss. If P does not file the required statement described in paragraph (b)(5) of this section, P's loss on the disposition of its interest in M is disallowed.

(e) *Anti-avoidance rules*—(1) *General rule.* The rules of § 1.1502–20 must be applied in a manner that is consistent with and reasonably carries out their purposes. If a taxpayer acts with a view to avoid the effect of the rules of this section, adjustments will be made as necessary to carry out their purposes.

(2) *Anti-stuffing rule*—(1) *Application.* This paragraph (e)(2) applies if—

(A) A transfer of any asset (including stock and securities) on or after March 9, 1990 is followed within 2 years by a direct or indirect disposition or a deconsolidation of stock, and

(B) The transfer is with a view to avoiding, directly or indirectly, in whole or in part—

(*1*) The disallowance of loss on the disposition or the basis reduction on the deconsolidation of stock of a subsidiary, or

(*2*) The recognition of the unrealized gain following the transfer.

A disposition or deconsolidation after the 2-year period described in this paragraph (e)(2)(i) that is pursuant to an agreement, option, or other arrangement entered into within the 2-year period is treated as a disposition or deconsolidation within the 2-year period for purposes of this section.

(ii) *Basis reduction.* If this paragraph (e)(2) applies, the basis of the stock is reduced, immediately before the disposition or deconsolidation, to cause the disallowance of loss, the reduction

of basis, or the recognition of gain, otherwise avoided by reason of the transfer.

(3) *Examples.* The principles of this paragraph (e) are illustrated by the following examples.

Example 1. Affiliated return activity. (i) In Year 1, individual A forms T. T's assets appreciate in value from $0 to $100. In year 3, A sells all of the T stock to P for $100 and T becomes a member of the P group, which does not file consolidated returns. During Years 3 to 6, the $100 of gain with respect to T's asset is recognized, generating earnings and profits that would have been described in paragraph (c)(1)(ii) of this section if the P group had filed consolidated returns during those years. Intending to sell the T stock and claim a loss on the sale, the P group elects to file consolidated returns for that year and makes a deemed dividend election under § 1.1502–32 (f)(2) with a view to avoid the effect of the rules of this section. The deemed dividend election has the effect of increasing P's basis in the T stock from $100 to $200. At the end of Year 7, P sells all of the T stock for $100 and recognizes a loss of $100.

(ii) Under the deemed dividend election, T is deemed to distribute its earnings and profits to P, and P is deemed to recontribute the distribution to T. Thus, the election has the effect of a basis increase described in paragraph (c)(1)(ii) of this section. The deemed distribution does not reduce P's basis in the T stock because it is not a distribution for which a negative adjustment is made under § 1.1502–32(b)(2)(iii), but the deemed recontribution increases P's basis in the T stock. T's earnings and profits are not described in (c)(1)(ii) of this section. Therefore, the deemed dividend election has the effect of producing a stock loss that is not disallowed under § 1.1502–20 even though a comparable loss arising under the investment adjustment system would be disallowed. Because the deemed dividend election was made with the view described in paragraph (e)(1) of this section, P's loss is disallowed.

(iii) The facts are the same as in (i) of this *Example*, except that, more than 2 years after it makes the deemed dividend election, T reinvests its sale proceeds in assets that appreciate in value and P sells the T stock for $200. The deemed dividend election has the effect of eliminating P's gain on the disposition of the T stock, but does not result in P recognizing a loss. P would not have been required to recognize gain if T's earnings and profits had been described in (c)(1)(ii) of this section. Therefore, the election does not cause P to recognize gain even though P made the election with the view described in paragraph (e)(1) of this section.

Example 2. Intercompany stock sales. (i) P is the common parent of a consolidated group, S is a wholly owned subsidiary of P, and T is a wholly owned recently purchased subsidiary of S. S has a $100 basis in the T stock, and T has a capital asset with a basis of $0 and a value of $100. T's asset declines in value to $60. Before T has any positive investment adjustments or extraordinary gain dispositions, S sells its T stock to P for $60 with a view to avoid the effect of the rules of this section on any subsequent sale of the T stock. T's asset reappreciates and is sold for $100, and T recognizes $100 of gain. P then cause T to liquidate and distribute the sale proceeds.

(ii) S's sale of the T stock to P is a deferred intercompany transaction, and S's $40 loss is deferred under section 267(f) and § 1.1502–13(c). When T liquidates, the $40 loss is taken into account under § 1.1502–13(f)(1) and § 1.267(f)–2T(d)(2). Because the amount determined under paragraph (c)(1) of this section is $0, none of S's loss would be disallowed under paragraph (a) of this section and $40 of the $100 built-in gain with respect to T's asset would be offset by the $40 stock loss.

(iii) If S had not sold the T stock to P, the P group would have had to recognize $100 of net income in order to increase the basis of T's assets from $0 to $100. The intercompany stock sale prevents this section from applying to disallow the stock loss and the sale therefore has the effect of avoiding the rules of this section. Consequently, because the sale to P was with the requisite view, S's $40 loss is disallowed.

Example 3. Basic stuffing case. (i) In Year 1, P buys all the stock of T for $100, and T becomes a member of the P group. T has an asset with a basis of $0 and a value of $100. T sells the asset for $100. Under the investment adjustment system, P's basis in the T stock increases from $100 to $200. In Year 5, P transfers to T an asset with a basis of $0 and a value of $100 in a transaction to which section 351 applies, with the view described in paragraph (e)(2)(i) of this section. In Year 6, P sells all the stock of T for $200.

(ii) Under paragraph (e)(2)(ii) of this section, P must reduce the basis in its T stock by $100 immediately before the sale. This basis reduction causes a $100 gain to be recognized on the sale.

(iii) The $100 basis reduction also would be required if the T stock is deconsolidated in Year 6 instead of being sold. P must reduce the basis in its T stock by $100 immediately before the deconsolidation.

(iv) The $100 basis reduction also would be required if the P stock were acquired at the beginning of Year 6 by the M consolidated group, even though the asset transfer took place outside the M group. Paragraph (e)(2)(i) of this section requires only that the transferor have the view at the time of the transfer.

Example 4. Stacking rules. (i) In Year 1, P buys all the stock of T for $100, and T becomes a member of the P group. T has an asset with a basis of $0 and a value of $100. T sells the asset for $100. Under the investment adjustment system, P's basis in the T stock increases from $100 to $200. In Year 5, when the value of the T stock remains $100, P transfers to T an asset with a basis of $0 and a value of $100 in a transaction to which section 351 applies, with the view described in paragraph (e)(2)(i) of this section. Thereafter, the value of the contributed asset declines to $10. In Year 6, P sells all the T stock for $110 and recognizes a $90 loss.

(ii) Because the transferred asset declined in value by $90, the transfer enabled P to avoid the disallowance of loss by the sale of T only to the extent of $10. Under paragraph (e)(2)(ii) of this section, P must reduce the basis in its T stock immediately before the sale to cause recognition of gain in an amount equal to the loss disallowance otherwise avoided by reason of the transfer. The amount of this basis reduction is $100, causing a $10 gain to be recognized on the sale.

(iii) The facts are the same as in (i) of this *Example*, except that the transferred asset does not decline in value and that T reinvests the $100 in proceeds from the asset sale in another asset that appreciates in value to $190. In Year 6, P sells T for $290. Because the new asset appreciated in value by $90, the transfer enabled P to avoid the disallowance of loss on the sale of T only to the extent of $10. Under paragraph (e)(2)(ii) of this section, P must reduce the basis in its T stock immediately before the sale to cause recognition of gain in an amount equal to the loss disallowance otherwise avoided by reason of the transfer. The amount of this basis reduction is $10, causing a $100 gain to be recognized on the sale.

Example 5. Contribution of built-in loss asset. (i) In Year 1, P forms S with a contribution of $100 in exchange for all of S's stock, and S becomes a member of the P group. S buys an asset for $100, and the asset appreciates in value to $200. P then buys all the stock of T for $100, and T becomes a member of the P group. T has an asset with a basis of $0 and a value of $100. T sells the asset for $100, and under the investment adjustment system P's basis in the T stock increases from $100 to $200. In Year 5, when the value of the T stock remains $100, P transfers the T stock to S in a transaction to which section 351 applies, with the view described in paragraph (e)(2)(i) of this section. The transfer causes P's basis in the S stock to increase from $100 to $300 and the value of S to increase from $200 to $300. In Year 6, P sells the S stock for $300.

(ii) Under paragraph (e)(2)(ii) of this section, P must reduce the basis in its S stock immediately before the sale to cause recognition of gain in an amount equal to the gain recognition otherwise avoided by reason of the transfer. The amount of this basis reduction is $100, causing a $100 gain to be recognized on the sale.

Example 6. Absence of view. (i) In Year 1, P buys all the stock of T for $100, and T becomes a member of the P group. T has 2 assets, asset 1 with a basis of $50 and value of $100, and asset 2 with a basis of $50 and value of $0. T sells asset 1 for $100. Under the investment adjustment system, P's basis in the T stock increases from $100 to $150. In Year 5, T transfers asset 2 to P in a transaction to which § 1.1502–14(a) applies, with a view to having the group retain the loss inherent in the asset. This transfer reduces P's basis in the T stock from $150 to $100. In Year 6, P sells all the T stock for $100.

(ii) The transfer from T to P achieves a result that could have been obtained by other methods that would not have been prevented by this section. The transfer therefore is not with the view described in paragraph (e)(2)(i) of this section, and P is not required to reduce the basis of its T stock under paragraph (e)(2)(ii) of this section. P is in substantially

the same position holding asset 2 as it would be if T sold the asset and the resulting loss was available to the P group (either through T or by reattribution under paragraph (g) of this section).

Example 7. Extending the time period for dispositions. (i) In Year 1, P buys all the stock of T for $100, and T becomes a member of the P group. T has an asset with a basis of $0 and a value of $100. T sells the asset for $100. Under the investment adjustment system, P's basis in the T stock increases from $100 to $200. At the beginning of Year 5, P transfers to T an asset with a basis of $0 and a value of $100 in a transaction to which section 351 applies, with the view described in paragraph (e)(2)(i) of this section. Within 2 years, P agrees to sell all the stock of T for $200 at the end of Year 7.

(ii) Under paragraph (e)(2) (i) of this section, P's disposition of the T stock at the end of Year 7 is treated as occurring within the 2-year period following P's transfer of the asset to T, because the disposition is pursuant to an agreement reached within 2 years after the transfer. Accordingly, under paragraph (e)(2)(ii) of this section, P must reduce the basis in its T stock by $100 immediately before the sale. This result is reached whether or not the agreement is in writing. P's disposition would also have been treated as occurring within the 2-year period if the disposition were pursuant to an option issued within the period.

Example 8. Application of section 267(f). (i) In Year 1, P forms S with a $100 capital contribution and S buys an asset for $100. In Year 2, the asset declines in value, and S sells the asset to P for $50 with the view described in paragraph (e)(2)(i) of this section. In Year 3, P sells the stock of S to an unrelated party for $50. In Year 4, P sells the asset to an unrelated party for $50.

(ii) S recognizes a $50 loss on its sale of the asset to P in Year 2, and the loss is deferred under section 267(f) and §§ 1.267(f)–2T(b) and 1.1502–13(c). Section 1.1502–13(f)(1)(iii) generally restores a selling member's deferred loss when the member ceases to be a member of the group. However, §§ 1.267(f)–2T(d)(1) and 1.267(f)–1(c)(6) provide that S's deferred loss is not restored when S ceases to be a member of the P group. Instead, under §§ 1.267(f)–2T(d)(2) and 1.267(f)–1T(c)(7), the $50 loss is restored to P's basis in the asset and P recognizes a $50 loss when P sells the asset in Year 4.

(iii) P recognizes a $50 loss on its sale of the S stock in Year 3. None of this loss is disallowed under paragraph (a)(1) of this section, because the amount disallowed may not exceed the $0 amount determined under paragraph (c)(1) of this section.

(iv) The sale of the asset by S to P has the effect of shifting the asset's $50 loss from S to P without a corresponding reduction in P's basis in the S stock. After the sale, P's loss with respect to the S stock is no longer duplicated with respect to S's assets for purposes of paragraph (c)(1)(iii) of this section. Because S's sale is with the requisite view, paragraph (e)(2) (ii) of this section applies. Accordingly, P must reduce the basis in its S stock by $50 immediately before the sale to prevent avoidance of the disallowance of loss on the stock disposition.

(f) *Investment adjustments and earnings and profits—*

(1) *Effect on investment adjustments and earnings and profits*—(i) *General rule.* For purposes of determining investment adjustments under § 1.1502–32 and earnings and profits under § 1.1502–33(c) with respect to a member that owns stock in a subsidiary, any deduction that is disallowed, or any amount by which basis is reduced, under this section is treated as a loss arising and absorbed by the member in the tax year in which the disallowance or basis reduction occurs.

(ii) *Example.* The principles of this paragraph (f)(1) are illustrated by the following example.

Example. (i) In Year 1, P forms S with a contribution of $100 and S becomes a member of the P group. S buys all the stock of T for $100. T has an asset with a basis of $0 and a value of $100. In Year 2, T sells the asset for $100. Under the investment adjustment system, S's basis in the T stock increases from $100 to $200, and P's basis in the S stock increases from $100 to $200. In Year 6, S sells all the stock of T for $100, and S's recognizes a loss of $100 that is disallowed under paragraph (a)(1) of this section.

(ii) Under paragraph (f)(1) of this section, the earnings and profits of S for Year 6 are reduced by $100, the amount of the loss disallowed under paragraph (a)(1) of this section. P's basis in the S stock is reduced from $200 to $100 under the investment adjustment system. Correspondingly, P's earnings and profits for Year 6 are reduced by $100, the amount of the loss disallowed under paragraph (a)(1) of this section.

(2) *Coordination rules*—(i) *Order of adjustments.* Deconsolidation of a share is treated as a disposition of the share for purposes of determining when investment adjustments are made and earnings and profits are determined with respect to the share.

(ii) *No tiering up of certain adjustments.* If the basis of stock of a subsidiary owned by a member (the "owning member") is reduced under this section on the deconsolidation of the stock, no corresponding adjustment is made under § 1.1502–32 to the basis of the stock of the owning member (or any higher tier member) if a disposition or deconsolidation occurs in the same transaction with respect to all the stock of the owning member. In the case of a disposition or deconsolidation in the same transaction of less than all the stock of the owning member, appropriate adjustments shall be made under § 1.1502–32 with respect to the stock of the owning member (or any higher tier member).

(iii) *Example.* The principles of this paragraph (f)(2) are illustrated by the following example.

Example. (i) P, the common parent of a group, owns all the stock of S, S owns all the stock of S1, and S1 owns all the stock of S2. P's basis in the S stock is $100, S's basis in the S1 stock is $100, and S1's basis in the S2 stock is $100. In Year 1, S2 buys all the stock of T for $100. T has an asset with a basis of $0 and a value of $100. In Year 2, T sells the asset for $100. Under the investment adjustment system, the basis of each subsidiary's stock increases from $100 to $200. In Year 6, S sells all the stock of S1 for $100 to A, an individual, and recognizes a loss of $100. S1, S2, and T are not members of a consolidated group immediately after the sale because the new S1 group does not file a consolidated return for its first taxable year.

(ii) Under paragraph (a)(1) of this section, no deduction is allowed to S for its loss on the sale of the S1 stock. Under paragraph (f)(1) of this section, S's earnings and profits for Year 6 are reduced by the $100 loss that is disallowed. Correspondingly, under the investment adjustment system, S's reduction in earnings and profits causes a deduction in P's basis in the S stock, and a reduction in P's earnings and profits for Year 6.

(iii) Under paragraph (b)(1) of this section, because the stock of T and S2 are deconsolidated, S2 must reduce the basis of the T stock from $200 to $100 (its value immediately before the deconsolidation), and S1 must reduce the basis of the S2 stock from $200 to $100 (its value immediately before the deconsolidation). Under paragraph (f)(1) of this section, S2's earnings and profits for Year 6 are reduced by the $100 reduction to the basis of the T stock, and S1's earnings and profits are reduced by the $100 reduction to the basis of the S2 stock. Under paragraph (f)(2)(ii) of this section, because the stock of S2 is deconsolidated in the same transaction, the basis reduction to the T stock does not cause any corresponding investment adjustment to the stock of S2, or to the stock of any higher tier subsidiary. Similarly, because the stock of S1 is disposed of in the same transaction, the reduction to the basis of the S2 stock does not cause an investment adjustment to the stock of S1, or the stock of any higher tier subsidiary.

(iv) *Basis reduction treated as investment adjustment.* For purposes of the consolidated return regulations, the amount of any basis reduction to stock under this section is generally treated as a net negative adjustment under § 1.1502–32(e) (in addition to the adjustment otherwise required under § 1.1502–32 (e)) with respect to the stock. The amount of the basis reduction is not treated as a net negative adjustment for purposes of § 1.1502–32T(a), however.

(g) *Reattribution of subsidiary's losses to common parent*—(1) *Reattribution rule.* If a member disposes of stock of a subsidiary and the member's loss would be disallowed under paragraph (a)(1) of this section, the common parent may make an irrevocable election to reattribute to itself any portion of the net operating

loss carryovers and net capital loss carryovers attributable to the subsidiary (and any lower tier subsidiary) without regard to the order in which they were incurred. The amount reattributed may not exceed the amount of loss that would be disallowed if no election is made under this paragraph (g). For this purpose, the amount of loss that would be disallowed is determined by applying paragraph (c)(1) of this section (without taking into account the requirement under paragraph (c)(3) of this section that a statement be filed) and by not taking the reattribution into account. The amount of loss that would be disallowed and the losses that may be reattributed are determined immediately after the disposition, but the reattribution is deemed to be made immediately before the disposition. The common parent succeeds to the reattributed losses as if the losses were succeeded to in a transaction described in section 381(a). Any owner shift of the subsidiary (including any deemed owner shift resulting from section 382(g)(4)(D) or 382(l)(3)) in connection with the disposition is not taken into account under section 382 with respect to the reattributed losses.

(2) *Insolvency limitation.* If the subsidiary whose losses are to be reattributed, or any higher tier subsidiary, is insolvent within the meaning of section 108(d)(3) at the time of the disposition, losses of the subsidiary may be reattributed only to the extent they exceed the sum of the separate insolvencies of any subsidiaries (taking into account only the subsidiary and its higher tier subsidiaries) that are insolvent. For purposes of determining insolvency, liabilities owed to higher tier members are not taken into account, and stock of a subsidiary that is limited and preferred as to dividends and that is not owned by higher tier members is treated as a liability to the extent of the amount of preferred distributions to which the stock would be entitled if the subsidiary were liquidated on the date of the disposition.

(3) *Investment adjustments.* Any losses reattributed under this paragraph (g) are treated for purposes of determining investment adjustments under § 1.1502–32 and earnings and profits under § 1.1502–33(c) as absorbed by the subsidiary (or lower tier subsidiary) immediately before the disposition. The losses, however, are not treated as absorbed for other tax purposes, such as section 172 or section 1212.

(4) *Examples.* The principles of this paragraph (g) are illustrated by the following examples.

Example 1. Basic reattribution case. (i) P, the common parent of a group, forms S with a contribution of $100. S has an operating loss of $60, which produces a deficit in earnings and profits that reduces P's basis in the S stock by $60 under the investment adjustment system. The group is unable to use the loss, and the loss becomes a net operating loss carryover attributable to S. Under the investment adjustment system, P's basis in the S stock is increased by $60, the amount of the unused loss, thus preserving P's $100 basis in the S stock. The remaining assets of S appreciate in value, and P sells all the stock of S for $55. But for an election to reattribute losses under this paragraph (g), P would have a $45 loss on the sale of S that would be disallowed.

(ii) P elects under paragraph (g)(1) of this section to reattribute to itself $45 of S's losses (the maximum amount permitted). As a result, $45 of the $60 net operating loss carryover attributable to S is reattributed to P. This reattributed loss may be included in the net operating loss carryover to subsequent consolidated return years of the P group. P succeeds to these losses as if the losses were succeeded to in a transaction described in section 381(a) and they retain their character as ordinary losses. The remaining $15 of net operating loss carryover attributable to S is carried over to the first separate return year of S.

(iii) The $45 reattributed loss is treated, solely for purposes of the investment adjustment system, as absorbed by S immediately before the disposition. This reduces P's basis in the S stock from $100 to $55 immediately before the disposition. As a result, P does not recognize any gain or loss on the disposition. However, S's deemed absorption of the reattributed loss for purposes of determining investment adjustments does not affect the use of the loss by the P group.

(iv) Assume that $20 of S's losses arose in Year 1 and $40 in Year 2, and that P elects to reattribute all $40 from Year 2 and $5 from Year 1. P succeeds to these losses as if the losses were succeeded to in a transaction described in section 381(a), and the losses retain their character as ordinary losses arising in Years 1 and 2. The losses continue to be subject to any limitations originally applicable to S, but P succeeds to them and may absorb the losses independently of S. (For example, P's use of the Year 2 losses does not depend on S's use of the Year 1 losses that were not reattributed to P.)

Example 2. Lower tier subsidiary. (i) P, the common parent of a group, forms S with a contribution of $100. S then forms T with a contribution of $40, and T borrows $60 from an unrelated lender. S has a net operating loss of $30. T has a net operating loss of $55 and is insolvent by $15. The group is unable to use these losses and the losses become net operating loss carryovers attributable to T and S. Under the investment adjustment system, S's basis in the T stock remains $40 and P's basis in the S stock remains $100. P sells all of the S stock for $30 ($100 invested, less S's $30 net operating loss and S's $40 unrealized loss on its investment in T stock). But for an election to reattribute losses under this paragraph (g), P would have a $70 loss on the sale of the S stock that would be disallowed.

(ii) S's $30 portion of the net operating loss carryover may be reattributed to P under paragraph (g)(1) of this section. Because T is insolvent by $15, paragraph (g)(2) of this section provides that only $40 of its $55 portion of the net operating loss carryover may be reattributed to P under paragraph (g)(1) of this section. There is no limitation, however, on which $40 of T's $55 loss may be reattributed.

(iii) P elects under paragraph (g)(1) of this section to reattribute to itself $40 of T's losses (the maximum amount permitted). P does not elect, however, to reattribute to itself any of S's losses. As a result, $40 of the $85 net operating loss carryover is reattributed to P. This reattributed loss may be included in the net operating loss carryover to subsequent consolidated return years of the P group. Of the $45 remaining net operating loss carryover, the $15 attributable to T and $30 attributable to S are carried over to their first separate return years.

(iv) The loss reattributed from T is treated, solely for purposes of the investment adjustment system, as absorbed by T immediately before the disposition. This reduces P's basis in the S stock to $60 immediately before the disposition. As a result, P recognizes only a $30 loss on the disposition of its S stock ($30 sale proceeds and $60 basis), and this loss is disallowed. However, T's deemed absorption of the reattributed loss for purposes of determining investment adjustments does not affect the use of the loss by the P group.

Example 3. Separate return limitation year losses. (i) P, the common parent of a group, buys the stock of S for $100. S has a net operating loss carryover of $40 from a separate return limitation year, and assets with a value and basis of $100. The assets of S decline in value by $40, and P sells all the stock of S for $60. But for an election to reattribute losses under this paragraph (g), P would have a $40 loss on the sale of S that would be disallowed.

(ii) S's $40 loss carryover from a separate return limitation year may be reattributed to P under paragraph (g)(1) of this section.

(iii) P elects under paragraph (g)(1) of this section to reattribute to itself S's $40 (loss the maximum amount permitted). Following the reattribution, the loss is included in the net operating loss carryover to subsequent consolidated return years of the P group.

(iv) The loss reattributed from S is treated, solely for purposes of the investment adjustment system, as absorbed by S immediately before the disposition. This reduces P's basis in the S stock to $60 immediately before the disposition. As a result, P recognizes no gain or loss on the disposition of its S stock. However, S's deemed absorption of the reattributed loss for purposes of determining investment adjustments does not affect the use of the loss by the P group, and the loss retains its

character as a separate return limitation year loss.

(5) *Time and manner of making the election*—(i) *In general.* The election described in paragraph (g)(1) of this section must be made in a separate statement entitled "this is an election under § 1.1502–20(g)(1) To reattribute losses of [insert names and employer identification numbers (E.I.N.) of each subsidiary whose losses are reattributed] to [insert name and employer identification number of common parent]." The statement must include the following information—

(A) For each subsidiary, the amount of each net operating loss and net capital loss, and the year in which each arose, that is reattributed to the common parent, and

(B) If a subsidiary ceases to be a member, the name and employer identification number of the person acquiring the subsidiary's stock.

The statement must be signed by the common parent, and by each subsidiary with respect to which loss is reattributed under this paragraph (g) that does not remain a member of the common parent's group immediately following the disposition. The statement must be filed with the group's income tax return for the tax year of the disposition and a copy of the statement must be retained by the subsidiary. If the acquirer is a subsidiary in a consolidated group, the name and employer identification number of the common parent of the group must be included in the statement, and a copy of the statement must also be delivered to the common parent.

(ii) *Filing of subsidiary's copy of statement.* The subsidiary whose losses are reattributed (or the common parent of any consolidated group that acquires the subsidiary or lower tier subsidiary) must attach its copy of the statement described in paragraph (g)(5)(i) of this section to its income return for the first tax year ending after the due date, including extensions, of the return in which the election required by paragraph (g)(5)(i) of this section is to be filed.

(h) *Effective dates*—(1) *General rule.* Except as otherwise provided in this paragraph (h), this section applies with respect to dispositions and deconsolidations on or after February 1, 1991. For this purpose, dispositions deferred under §§ 1.1502–13, 1.1502–13T, 1.1502–14, and 1.1502–14T are deemed to occur at the time the deferred gain or loss is taken into account unless the stock was deconsolidated before February 1, 1991. If stock of a subsidiary became worthless during a taxable year including February 1, 1991, the disposition with respect to the stock is treated as occurring on the date the stock became worthless.

(2) *Election to accelerate effective date*—(i) *In general.* A group may make an irrevocable election to apply this section to all its members, instead of § 1.337(d)–2, with respect to all dispositions and deconsolidations on or after November 19, 1990.

(ii) *Time and manner of making the election—in general.* The election described in paragraph (h)(2)(i) of this section must be made in a separate statement entitled "this is an election under § 1.1502–20(h)(2) to accelerate the application of § 1.1502–20 to the consolidated group of which [insert name and employer identification number of common parent] is the common parent." The statement must be signed by the common parent and filed with the group's income tax return for the tax year of the first disposition or deconsolidation to which the election applies. If the separate statement required under this paragraph (h) (2) (ii) is to be filed with a return the due date (including extensions) of which is before April 16, 1991, the statement may be filed with an amended return for the year of the disposition or deconsolidation. Any other filings required under this § 1.1502–20, such as the statement required under § 1.1502–20(c)(3), which ordinarily cannot be made with an amended return, must be made at such time and in such manner as permitted by the Commissioner.

(3) *Binding contract rule.* For purposes of this paragraph (h), if a disposition or deconsolidation is pursuant to a binding written contract entered into before March 9, 1990, and in continuous effect until the disposition or deconsolidation, the date the contract became binding is treated as the date of the disposition or deconsolidation.

(4) *Application of § 1.1502–20T to certain transactions*—(i) *In general.* If a group files the certification described in paragraph (h)(4)(ii) of this section, it may apply § 1.1502–20T (as contained in the CFR edition revised as of April 1, 1990), to all of its members with respect to all dispositions and deconsolidations by the certifying group to which § 1.1502–20T otherwise applied by its terms occurring—

(A) On or after March 9, 1990 (but only if not pursuant to a binding contract described in § 1.337(d)–1T(e)(2) (as contained in the CFR edition revised as of April 1, 1990) that was entered into before March 9, 1990); and

(B) Before November 19, 1990 (or thereafter, if pursuant to a binding contract described in § 1.1502–20T(g)(3) that was entered into on or after March 9, 1990 and before November 19, 1990).

The certification under this paragraph (h)(4)(i) with respect to the application of § 1.1502–20T to any transaction described in this paragraph (h)(4)(i) may not be withdrawn and, if the certification is filed, § 1.1502–20T must be applied to all such transactions on all returns (including amended returns) on which such transactions are included.

(ii) *Time and manner of filing certification.* The certification described in paragraph (h)(4)(i) of this section must be made in a separate statement entitled "[insert name and employer identification number of common parent] hereby certifies under § 1.1502–20 (h)(4) that the group of which it is the common parent is applying § 1.1502–20T to all transactions to which that section otherwise applied by its terms." The statement must be signed by the common parent and filed with the group's income tax return for the taxable year of the first disposition or deconsolidation to which the certification applies. If the separate statement required under this paragraph (h)(4) is to be filed with a return the due date (including extensions) of which is before November 16, 1991, the statement may be filed with an amended return for the year of the disposition or deconsolidation that is filed within 180 days after September 13, 1991. Any other filings required under § 1.1502–20T such as the statement required under § 1.1502–20T(f)(5), may be made with the amended return, regardless of whether § 1.1502–20T permits such filing by amended return.

(5) *Cross reference.* For transitional loss limitation rules, see §§ 1.337(d)–1 and 1.337(d)–2.

Par. 7. Paragraph (r) of § 1.1502–12 is revised to read as follows:

§ 1.1502–12 Separate taxable income.

* * * * *

(r) For rules relating to loss disallowance or basis reduction on the disposition or deconsolidation of stock of a subsidiary, see §§ 1.337(d)–1, 1.337(d)–2 and § 1.1502–20.

* * * * *

Par. 8. The last sentence of § 1.1502–32 (a) is revised to read as follows:

§ 1.1502–32 Investment adjustment.

(a) * * * For rules relating to loss disallowance or basis reduction on the disposition or deconsolidation of stock of a subsidiary, see §§ 1.337(d)–1, 1.337(d)–2 and § 1.1502–20.

* * * * *

Par. 9. The last sentence of § 1.1502–33(c)(6) is revised to read as follows:

§ 1.1502-33 Earnings and profits.

* * * * *

(c) * * *

(6) * * * For rules relating to the effect on earnings and profits of loss disallowance or basis reduction on the disposition or deconsolidation of stock of a subsidiary, see §§ 1.337(d)-1, 1.337(d)-2 and § 1.1502-20.

* * * * *

Par. 10.1 Section § 1.1502-79 is amended by adding paragraph (a) (1) (iii) to read as follows:

§ 1.1502-79 Separate return years.

(a) * * *

(1) * * *

((iii) For rules permitting the reattribution of losses of a subsidiary to the common parent in the case of loss disallowance or basis reduction on the disposition or deconsolidation of stock of the subsidiary, see § 1.1502-20.

* * * * *

PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT

Par. 11. The authority citation for part 602 continues to read as follows:

Authority: (26 U.S.C. 7805)

Par. 12. Section 602.101(c) is amended by adding in the appropriate place in the table § 1.337(d)-2 * * * 1545-1160" and "§ 1.1502-20 * * * 1545-1160".

September 6, 1991.

Fred T. Goldberg, Jr.,

Commissioner of Internal Revenue.

Approved:

Kenneth W. Gideon,

Assistant Secretary of the Treasury.

[FR Doc. 91-22463 Filed 9-13-91; 1:50 am]

BILLING CODE 4830-01-M

LIBRARY OF CONGRESS

Copyright Office

37 CFR Part 202

[Docket No. 91-8]

Registration of Claims to Copyright: Deposit of CD-ROM Format

AGENCY: Library of Congress, Copyright Office.

ACTION: Final rules.

SUMMARY: The Copyright Office of the Library of Congress is amending its regulations governing the deposit for copyright registration of works fixed in a CD-ROM format, pursuant to section 408 of the Copyright Act. The proposed amendments require the deposit of the best edition CD-ROM package of any work, including the accompanying operating software, instruction manual, and a printed version, if available.

EFFECTIVE DATE: October 21, 1991.

FOR FURTHER INFORMATION CONTACT: Dorothy Schrader, (202) 707-8380.

SUPPLEMENTARY INFORMATION: Under section 408 of the Copyright Act of 1976, title 17 of the United States Code, the Register of Copyrights is authorized to specify by regulation the nature of the copies or phonorecords to be deposited for various classes of works. Pursuant to the authority granted to the Register in section 408(c), which authorizes the Register to require or permit for particular classes the deposit of identifying materials instead of copies or phonorecords, the Copyright Office regulations at 37 CFR 202.20(c) require the deposit of identifying portions of certain works embodied in a machine-readable format in lieu of machine-readable copies.

At the time this regulation was implemented in 1978, machine-readable copies were not widely marketed to the public-at-large and for this reason the Library of Congress decided not to acquire such copies for its collections, and exempted machine-readable copies from mandatory deposit for use of the Library under section 407. Since that time, great changes have occurred. As a result of their great popularity, machine-readable computer software and databases are in wide demand. In response to these public needs, the Library of Congress established a Machine-Readable Collections Reading Room to provide access to standard reference materials and computer programs available in machine-readable form.

On October 16, 1989 the Copyright Office published final regulations (54 FR 42295) revoking the exemption from mandatory deposit of certain machine-readable copies under section 407 for use of the Library of Congress. The amended rules require the deposit of the best edition CD-ROM package under section 408 for copyright registration for any work reproduced in CD-ROM format. The regulations regarding mandatory deposit pursuant to section 407 are also adjusted to parallel the change in the deposit for registration.

Under the amended rules, where a work has been fixed in a CD-ROM format, the deposit for registration shall consist of the complete CD-ROM package, including the accompanying software and instruction manual, and a printed version of the work, if available. A complete copy of a published work includes all of the elements comprising the applicable unit of publication of the work, including elements that, if considered separately, would not be copyrightable subject matter or could be the subject of a separate registration.

These amendments are issued to clarify that a CD-ROM package, whenever available, is the preferred form of deposit for the works embodied therein, both for registration and mandatory deposit. The CD-ROM package is emerging as a major format for dissemination of important information and reference works. The Library of Congress needs to add this format to the national collection for the benefit of the public and the Congress.

The deposit requirements for automated databases, compilations, statistical compendia and the like are not changed if the works are available only on-line, or if they are not available in a CD-ROM format. The deposit for most machine-readable works will continue to be one copy of identifying portions of the work, reproduced in visually perceptible form.

The Machine-Readable Reading Room displays a warning of copyright to advise readers about the restrictions of the copyright law.

With respect to the Regulatory Flexibility Act, the Copyright Office takes the position that this Act does not apply to Copyright Office rulemaking. The Copyright Office is a department of the Library of Congress, which is part of the legislative branch. Neither the Library of Congress nor the Copyright Office is an "agency" within the meaning of the Administrative Procedure Act of June 11, 1946, as amended (title 5, of U.S. Code, subchapter II and chapter 7). The Regulatory Flexibility Act consequently does not apply to the Copyright Office since that Act affects only those entities of the Federal Government that are agencies as defined in the Administrative Procedure Act.[1]

Alternatively, if it is later determined by a court of competent jurisdiction that the Copyright Office is an "agency" subject to the Regulatory Flexibility Act, the Register of Copyrights has determined and hereby certifies that this regulation will have no significant impact on small businesses.

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[1] The Copyright Office was not subject to the Administrative Procedure Act before 1978, and it is now subject to it only in areas specified by section 701(d) of the Copyright Act (i.e. "all actions taken by the Register of Copyrights under this title (17), except with respect to the making of copies of copyright deposits) (17 U.S.C. 706(b)). The Copyright Act does not make the Office an "agency" as defined in the Administrative Procedure Act. For example, personnel actions taken by the Office are not subject to APA-FOIA requirements.

List of Subjects in 37 CFR Part 202

Copyright registration; Computer technology; Databases.

Final Rules

In consideration of the foregoing, part 202 of 37 CFR, chapter II is amended in the manner set forth below.

PART 202—REGISTRATION OF CLAIMS TO COPYRIGHT

1. The authority citation for part 202 continues to read as follows:

Authority: Sec. 702, Pub. L. 94–553, 90 Stat. 2541 (17 U.S.C. 702).

2. Section 202.19(c)(5) is revised to read as follows:

§ 202.19 Deposit of published copies or phonorecords for the Library of Congress.

* * * * *

(c) * * *

(5) Automated databases available only on-line in the United States. The exemption does not include the following: automated databases distributed in the form of machine-readable copies (such as magnetic tape or disks, CD-ROM formats, punch cards, or the like); computerized information works in the nature of statistical compendia, serials, and reference works; works published in a form requiring the use of a machine or device for purposes of optical enlargement (such as film, filmstrips, slide films and works published in any variety of microform); works published in visually perceptible form but used in connection with optical scanning devices; and works reproduced in CD-ROM formats.

* * * * *

3. Section 202.20(c)(2)(vii) introductory text is revised to read as follows:

§ 202.20 Deposit of copies and phonorecords for copyright registration.

* * * * *

(c) * * *

(2) * * *

(vii) *Computer programs and databases embodied in machine-readable copies other than CD-ROM format.* In cases where a computer program, database, compilation, statistical compendium, or the like, if unpublished is fixed, or if published is published only in the form of machine-readable copies (such as magnetic tape or disks, punched cards, semiconductor chip products, or the like) other than a CD-ROM format, from which the work cannot ordinarily be perceived except with the aid of a machine or device, the deposit shall consist of:

* * * * *

§ 202.20 [Amended]

4. The heading and the first sentence of § 202.20(c)(2)(viii) introductory text are revised to read as follows:

* * * * *

(c) * * *

(2) * * *

(viii) *Machine-readable copies of works other than computer programs, databases, and works fixed in a CD-ROM format.* Where a literary, musical, pictorial, graphic, or audiovisual work, or a sound recording, except for works fixed in a CD-ROM format and literary works which are computer programs, databases, compilations, statistical compendia or the like, if unpublished has been fixed or, if published, has been published only in machine-readable form, the deposit must consist of identifying material.

* * * * *

§ 202.20 [Amended]

5. Section 202.20(c)(2)(ix) is revised to read as follows:

* * * * *

(c) * * *

(2) * * *

(ix) *Copies containing both visually-perceptible and machine-readable material other than a CD-ROM format.* Where a published literary work is embodied in copies containing both visually-perceptible and machine-readable material, except in the case of a CD-ROM format, the deposit shall consist of the visually-perceptible material and identifying portions of the machine-readable material.

* * * * *

§ 202.20 [Amended]

6. Section 202.20 is amended by adding a new paragraph (c)(2) (xvii) to read as follows:

* * * * *

(c) * * *

(2) * * *

(xvii) *Works fixed in a CD-ROM format.* (A) Where a work is fixed in a CD-ROM format, the deposit must consist of one complete copy of the entire CD-ROM package, including a complete copy of any accompanying operating software and instructional manual, and a printed version of the work embodied in the CD-ROM, if the work is fixed in print as well as a CD-ROM. A complete copy of a published CD-ROM package includes all of the elements comprising the applicable unit of publication, including elements that if considered separately would not be copyrightable subject matter or could be the subject of a separate registration.

(B) In any case where the work fixed in a CD-ROM package cannot be viewed on equipment available in the Examining Division of the Copyright Office, the Office will seek an appropriate deposit in accordance with paragraph (d) of this section, in addition to the deposit of the CD-ROM package.

* * * * *

Dated: August 8, 1991.

Ralph Oman,

Register of Copyrights.

Approved by:

James H. Billington,

Librarian of Congress.

[FR Doc. 91–22532 Filed 9–18–91; 8:45 am]

BILLING CODE 1410–07–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 35

[OA–FRL–4010–4]

State and Local Assistance Grants for Construction of Wastewater Treatment Works

AGENCY: Environmental Protection Agency.

ACTION: Deviation to rule.

SUMMARY: Under the authority of 40 CFR 31.6(d), the Environmental Protection Agency (EPA) issued a class deviation from the provisions of 40 CFR 35.2010(d) of the construction grant regulations. This deviation extended the period of availability on deobligated construction grant funds reissued on or after October 1, 1990, after their initial period of availability, until the last day of FY 1995 (September 30, 1995).

DATES: This deviation was effective August 23, 1991.

FOR FURTHER INFORMATION CONTACT: Ms. Marian P. Cody, Grants Administration Division (PM–216F), 401 M Street, SW., Washington, DC 20460, 202–382–5273.

SUPPLEMENTARY INFORMATION: Under the authority of 40 CFR 31.6(d), the Environmental Protection Agency (EPA) issued a class deviation from the provisions of 40 CFR 35.2010(d). The deviation extended the period of availability for deobligated Title II funds reissued on or after October 1, 1990, until the end of FY 1995.

Closing out the construction grant program in the next several years is a high priority for EPA and the States. Deobligated funds are important because they will be the only source within each State for funding future program needs (i.e., grant increases and State program management costs in

accordance with the LaJuana Wilcher memorandum of July 17, 1990.) Because needs for deobligated funds may not occur within the current two year period of availability under current regulation, it would be inappropriate for EPA to force States to choose between obligating such funds and losing them to reallotment. Rather, States should be allowed to manage their deobligated funds in a manner which will allow them to use these funds to manage their projects to successful completion.

The class deviation is published following this notice.

Dated: August 21, 1991.

Edward J. Hanley,

Acting Assistant Administrator for Administration and Resources Management.

Dated: August 5, 1991.

Martha G. Prothro,

Acting Assistant Administrator for Water.

Memorandum

Subject: Class Deviation from 40 CFR 35.2010(d)

From: Harvey G. Pippen, Jr., Director, Grants Administration Division

To: Regional Administrators, Regions I–X

Dated: August 23, 1991.

Action

I am approving a deviation from the provisions of 40 CFR 35.2010(d). This deviation allows deobligated (CWA) construction grant funds reissued on or after October 1, 1990, and after their initial period of availability, to remain available for obligation in the same State until the last day of FY 1995.

Background

Section 205(b)(2) of the Clean Water Act provides that deobligated funds be added to amounts last allotted to a State and be available for obligation in the same manner and to the same extent as such last allotment. Section 205(d) provides that allotted funds that remain unobligated at the end of the year following the year of allotment shall be reallotted. EPA implemented these provisions in 1984, in part, through regulation at 40 CFR 35.2010(d) (1984) which states that deobligated funds reissued after their reallotment date shall be available for up to 2 years for obligation in the same State. This was an appropriate procedure prior to FY 1991 when there was a series of follow-on allotments and reallotments.

Circumstances have now changed because there are no more construction grant allotments. The last allotment was in FY 1990 and those funds are available for obligation only through the end of FY 1991. Funds not obligated during that period are subject to reallotment and reissuance to the States in FY 1992. Beginning in FY 1993, section 205(d) does not require reallotments. Since deobligated construction grant funds are no-year money (i.e., they remain available until expended to carry out the purpose of the appropriation), the funds may remain available for obligation in the same State. Therefore, it is appropriate to grant this deviation from the regulatory two year limit on availability.

Bringing the construction grant program to an expeditious and successful completion in the next several years is a high priority for the Agency and the States. Deobligations are important because they will be the only source within each State for funding grant increases. (Up to $400,000 per year may also be used to fund State program management costs in accordance with the LaJuana Wilcher memorandum of July 17, 1990.) Because needs for deobligated funds may not occur within the period of their availability under the current regulation (i.e., within two years or less time), it would be inappropriate for EPA to force States to choose between obligating such funds and losing them to reallotment. Rather, States should be allowed to manage their deobligated funds in a manner that allows them to manage their projects to successful completion.

Providing a longer period of availability for deobligated funds gives States the flexibility necessary to manage program completion efficiently and effectively. This action is consistent with the principles of Total Quality Management and Section 101(f) of the Act, which directs the Agency to make the best use of available funds. That is, this deviation will permit States to match dwindling funds to priority needs in a timely manner.

The goal of the national strategy for completing and closing out the construction grant program is to have all projects administratively completed by the end of FY 1995. Extending the reallotment date of deobligated funds through FY 1995 should provide sufficient time for States to use these funds effectively.

This deviation extends the reallotment date of deobligated Title II funds reissued on or after October 1, 1990, until the end of FY 1995.

Dated: August 5, 1991.

Concur:

Martha G. Protho,

Acting Assistant Administrator for Water.

Dated: August 21, 1991.

Concur:

Edward J. Hanley,

Assistant Administrator for Administration and Resources Management.

[FR Doc. 91–22622 Filed 9–18–91; 8:45 am]

BILLING CODE 6560–50–M

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40 CFR Part 61

[AD-FRL-3975-3]

National Emission Standards for Hazardous Air Pollutants; Amendment to Benzene Rule for Coke By-Product Recovery Plants

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: On September 14, 1989, EPA published, under the authority of section 112 of the Clean Air Act (CAA), a final rule promulgating 40 CFR part 61 subpart L, national emission standards for hazardous air pollutants (NESHAP) for benzene emissions from coke by-product recovery plants (54 FR 38044). The EPA proposed on April 1, 1991 (56 FR 13368), and today is promulgating, a revision to subpart L to add provisions for the use of certain add-on control devices as alternative means of complying with the standards for process vessels, storage tanks and tar-intercepting sumps. The additional provisions do not change the stringency of the standards. The provisions also include testing, monitoring, recordkeeping and reporting requirements for these alternative controls. No other changes to the September 14, 1989 benzene NESHAP are made in this notice.

DATES: *Effective Date.* September 19, 1991.

Each NESHAP issued under the authority of section 112 of the CAA is effective on the date of publication of the final NESHAP in the **Federal Register**. The NESHAP to control benzene emissions from coke by-product recovery plants, 40 CFR part 61 subpart L, was effective September 14, 1989. The revisions to Subpart L in today's notice are effective September 19, 1991. Promulgation of these revisions does not alter the general effective date of subpart L.

Judicial Review. Under section 307(b)(1) of the CAA, judicial review of the actions taken by this notice is available only by the filing of a petition for review in the U.S. Court of Appeals for the District of Columbia Circuit within 60 days of today's publication of this rule. Under section 307(b)(2) of the CAA, the requirements that are the subject of today's notice may not be challenged later in civil or criminal proceedings brought by EPA to enforce these requirements.

ADDRESSES: *Docket.* Docket No. A–79–16, containing information considered by EPA in the development of the promulgated standards, is available for public inspection and copying between 8:30 a.m. and 3:30 p.m., Monday through Friday, at EPA's Air Docket Section, Waterside Mall, room M1500, 1st floor, 401 M Street, SW., Washington, DC 20460. A reasonable fee may be charged for copying.

FOR FURTHER INFORMATION CONTACT: For further information on the basis and content of this rulemaking, contact Ms. Gail Lacy at (919) 541–5261, Standards Development Branch, Emission Standards Division (MD–13), U.S. Environmental Protection Agency,

Research Triangle Park, North Carolina 27711. For further information on the emission testing aspects of this rule, contact Mr. William Grimley at (919) 541–1065, Emission Measurement Branch, Technical Support Division (MD–19) at the above address.

SUPPLEMENTARY INFORMATION:

The Standards

On September 14, 1989, EPA published a final NESHAP under the authority of section 112 of the CAA to control benzene emissions from coke by-product recovery plants (54 FR 38044). The rule is contained in subpart L of 40 CFR part 61. On November 13, 1989, the American Coke and Coal Chemicals Institute (ACCCI) filed a petition for review of the benzene NESHAP with the U.S. Court of Appeals for the District of Columbia Circuit. The EPA and ACCCI entered into an agreement to settle this litigation. The agreement, submitted to the Court on May 22, 1990, is based on EPA's adding provisions to the NESHAP allowing the use of carbon adsorbers and of vapor incinerators that achieve as much emission reduction as gas blanketing. These control devices are alternative means of compliance used to control benzene emissions from sources subject to 40 CFR 61.132. The record in the case was remanded to EPA, thereby permitting EPA, in accordance with section 112(q) of the CAA Amendments of 1990, to revise the NESHAP on the basis of section 112 as in effect prior to November 15, 1990.

In accordance with the settlement, EPA proposed on April 1, 1991 (56 FR 13368), and today is promulgating, a revision to EPA's subpart L to add provisions for the use of carbon adsorbers and vapor incinerators to control sources subject to 40 CFR 61.132. These control devices would be alternatives to a gas-blanketing system, the control technology on which the standards were based. The sources subject to § 61.132 are process vessels, tar-intercepting sumps, and storage tanks. Process vessels are defined in subpart L as tar decanters, flushing liquor circulation tanks, light-oil condensers, light-oil decanters, wash-oil decanters, and wash-oil circulation tanks.

This amendment includes detailed, step-by-step provisions designed to assure that each control device achieves emission reductions equivalent to gas blanketing. These provisions are design, operational, testing, monitoring, recordkeeping and reporting requirements. They are summarized in more detail in the preamble to the proposed rule. No adverse environmental, energy or cost impacts are associated with this amendment.

Public Participation

This amendment was proposed in the **Federal Register** on April 1, 1991 (56 FR 13368). A public hearing was offered to anyone who requested the opportunity for oral presentation of data, views or arguments concerning the proposed rule. No one requested a hearing. The public comment period on the proposed rule was open from April 1 to May 1, 1991. One comment letter was received. The comments in this letter have been carefully considered; EPA's response is provided in the next section of this preamble.

Significant Comments and Changes to the Proposed Standards

The EPA received a comment letter from a representative of a coke by-product recovery plant that is planning to install a nitrogen gas-blanketing system connected to a catalytic incinerator. The commenter said that for his particular system, the flow indicator required by the proposed rule would not provide useful information on the proper operation of the control system. The proposed rule included a requirement that a flow indicator be installed in the duct from the emission point to the incinerator before the stream is combined with any other stream. Periods of no flow or periods when the vent stream was diverted from the control device were required to be reported. The commenter noted that in his system, under proper operation, there would be periods of no flow in the line that connects the source to the combined flow duct to the control device, such as when there are no working or breathing losses from a storage tank. Additionally, under normal operation, there could be flow in this line toward the source (e.g., when the vapor pressure in the source drops, causing nitrogen to flow toward the source). These periods would not necessarily indicate that emissions were being diverted from the vapor incinerator. The commenter requested an opportunity to use alternative monitoring procedures in cases such as his where the proposed required monitoring would not yield useful information.

The EPA agrees that the monitoring in the proposed rule does not achieve the desired result on a system such as the commenter's, in which there is a nitrogen blanket. The purpose of the flow indicator is to provide a record of each period when the emissions bypass the control device and are emitted to the atmosphere. Emissions bypass the control device during a number of events, including the opening of a relief device on the source or the diversion of the flow in the closed vent system to the atmosphere. To address situations where the proposed monitoring and associated recordkeeping and reporting are not good indicators that the control device has been bypassed, EPA has provided alternative monitoring requirements in the final rule. These alternatives are substantively the same as those included in the NESHAP for benzene transfer operations (40 CFR part 61 subpart BB). One alternative is to place a flow indicator in each line that could divert emissions from the vapor incinerator (i.e., a bypass line). In this case, periods of flow away from the control device are required to be recorded and reported. A second alternative is for situations when there is a car seal or a lock-and-key arrangement on the device used to change the position of a bypass line valve (e.g., from closed to open). In this case, there is no requirement for a flow indicator. The owner or operator would be required to visually inspect the seal or closure mechanism at least once every month to ensure that it is maintained in the closed position such that the vent stream is not diverted to the atmosphere through the bypass line. In addition, the owner or operator is required to identify the date and duration of each period when the car seal has been broken or the valve has been open.

A correction has been made to the recordkeeping requirements for vapor incinerators. The proposed rule stated that an exceedance of the temperature parameter for a vapor incinerator was any 3-hour period during which the monitored combustion temperature averaged less than 28°C (50°F) below the average combustion temperature during the most recent performance test. This is correct for a vapor incinerator other than a catalytic incinerator. However, the proposed rule inadvertently did not include the definition of an exceedance for a catalytic incinerator; it has been included in the final rule. For a catalytic incinerator, an exceedance is defined as any 3-hour period during which the monitored temperature of the vent stream immediately before the catalyst bed is more than 28°C (50°F) below the average temperature of the vent stream during the most recent performance test. In addition, an exceedance is any 3-hour period during which the average temperature difference across the catalyst bed is less than 80 percent of the average temperature difference across the catalyst bed during the most

recent performance test. These specifications are consistent with other EPA rules that include requirements for catalytic incinerators. Examples of these other rules are the NESHAP for benzene waste operations (40 CFR part 61 subpart FF), and the new source performance standards for organic emission sources in the synthetic organic chemical manufacturing industry (40 CFR part 60 subparts III and NNN).

Clarification on Flare Use

During EPA's review of the initial reports for subpart L, the question arose as to whether § 61.132(a) prohibits the flaring of coke oven gas instead of using it to underfire the coke oven. There are situations where more clean coke oven gas is generated than can be used to underfire the coke ovens and a plant may not have other opportunities to sell or use it as fuel. In these situations, flares typically have been used to burn this coke oven gas.

The EPA would like to clarify that it considers flares to be part of the gas combustion system at the by-product plant. In the document Benzene Emissions from Coke By-Product Recovery Plants—Background Information Document to the Revised Proposed Standards (EPA–450/3–83–016b), § 7.2 includes a discussion of EPA's cost analysis of the standards for plants where EPA knew that coke oven gas is flared. Thus, EPA did not intend to prohibit this practice. However, it is important to note that § 61.132(a)(2) of subpart L requires that the benzene emissions from the subject sources be recovered or destroyed. Therefore, when benzene from subject sources is vented to the coke oven gas system and is not recovered as a light oil product, excess coke oven gas containing the benzene may not be vented directly to the atmosphere. Furthermore, the flare must be designed and operated to reduce the benzene emissions by at least 98 percent. Examples of flare specifications that would achieve greater than or equal to 98 percent control of benzene are those in 40 CFR 60.18.

Miscellaneous

Docket: The docket is an organized and complete file of all the information submitted to or otherwise considered by EPA in the development of this rulemaking. The docketing system is intended to allow members of the public and industries involved to readily identify and locate documents so that they can effectively participate in the rulemaking process. Along with the statement of basis and purpose of the proposed and promulgated revisions, and EPA responses to significant comments, the contents of the docket, except for interagency review materials, will serve as the record in case of judicial review [section 307(d)(7)(A)].

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.* and have been assigned OMB control number 2060–0185. Comments on these requirements, including suggestions for reducing this burden, should be submitted to the Office of Information and Regulatory Affairs, OMB, 725 17th Street, NW., Washington, DC, 20503, marked "Attention: Desk Officer for EPA" as well as to Chief, Information Policy Branch (PM–223Y), USEPA, 401 M Street, SW., Washington, DC, 20460.

During the first 3 years that the rule is in effect, the public reporting burden for collection of information, including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information is estimated to be 190 hours per year per respondent. This paperwork burden is required for owners or operators who choose to use one of the add-on control devices provided for in today's rule to comply with subpart L. However, the use of these alternative controls instead of gas blanketing, the control on which 40 CFR 61.132 is based, is optional.

Executive Order 12291

Under Executive Order 12291, EPA must judge whether a regulatory action is "major" and, therefore, subject to the requirement of a regulatory impact analysis. This rule is not major because it is a technical amendment to allow alternative controls to be used to comply with an existing regulation and, therefore, results in none of the significant adverse economic effects described in the Order. This rulemaking was submitted to OMB for review as required by Executive Order 12291. Any written comments from OMB to EPA and any EPA response to those comments are included in Docket No. A–79–16. The docket is available for public inspection at EPA's Air Docket listed under the **ADDRESSES** section of this notice.

Regulatory Flexibility Act

The Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) requires the identification of potentially adverse impacts of Federal regulations upon small business entities. The Act specifically requires the completion of a Regulatory Flexibility Analysis in those instances where small business impacts are possible. Because this amendment imposes no adverse economic impacts, a Regulatory Flexibility Analysis has not been conducted.

Pursuant to the provisions of 5 U.S.C. 605(b), I hereby certify that this rule will not have a significant economic impact on a substantial number of small entities.

List of Subjects in 40 CFR Part 61

Air pollution control, Asbestos, Benzene, Beryllium, Coke oven emissions, Hazardous substances, Incorporations by reference, Inorganic arsenic, Intergovernmental relations, Mercury, Radionuclides, Reporting and recordkeeping requirements, Vinyl chloride, Volatile hazardous air pollutants.

Dated: September 12, 1991.

William K. Reilly,

Administrator.

For the reasons set out in the preamble, title 40, chapter I, part 61 of the Code of Federal Regulations is amended as follows:

1. The authority citation for part 61 continues to read as follows:

Authority: Sections 101, 112, 114, 116, 301 of the Clean Air Act as amended (42 U.S.C. 7401, 7412, 7414, 7416, 7601).

2. Section 61.130 of subpart L is amended by revising the heading and by adding paragraphs (c) and (d) to read as follows:

§ 61.130 Applicability, designation of sources, and delegation of authority.

* * * * *

(c) In delegating implementation and enforcement authority to a State under section 112 of the Act, the authorities contained in paragraph (d) of this section shall be retained by the Administrator and not transferred to a State.

(d) Authorities that will not be delegated to States:

§ 61.136(d)

3. Section 61.131 of subpart L is amended by adding the following definitions in alphabetical order to read as follows:

§ 61.131 Definitions:

* * * * *

Car seal means a seal that is placed on the device used to change the position of a valve (e.g., from open to closed) such that the position of the valve cannot be changed without

breaking the seal and requiring the replacement of the old seal, once broken, with a new seal.

* * * * *

Non-regenerative carbon adsorber means a series, over time, of non-regenerative carbon beds applied to a single source or group of sources, where non-regenerative carbon beds are carbon beds that are either never regenerated or are moved from their location for regeneration.

* * * * *

Regenerative carbon adsorber means a carbon adsorber applied to a single source or group of sources, in which the carbon beds are regenerated without being moved from their location.

* * * * *

Vapor incinerator means any enclosed combustion device that is used for destroying organic compounds and does not necessarily extract energy in the form of steam or process heat.

* * * * *

4. Section 61.139 of subpart L is revised to read as follows:

§ 61.139 Provisions for alternative means for process vessels, storage tanks, and tar-intercepting sumps.

(a) As an alternative means of emission limitation for a source subject to § 61.132(a)(2) or § 61.132(d), the owner or operator may route gases from the source through a closed vent system to a carbon adsorber or vapor incinerator that is at least 98 percent efficient at removing benzene from the gas stream.

(1) The provisions of § 61.132(a)(1) and § 61.132(a) (2)(i) and (ii) shall apply to the source.

(2) The seals on the source and closed vent system shall be designed and operated for no detectable emissions, as indicated by an instrument reading of less than 500 ppm above background and visual inspections, as determined by the methods specified in § 61.245(c).

(3) The provisions of § 61.132(b) shall apply to the seals and closed vent system.

(b) For each carbon adsorber, the owner or operator shall adhere to the following practices:

(1) Benzene captured by each carbon adsorber shall be recycled or destroyed in a manner that prevents benzene from being emitted to the atmosphere.

(2) Carbon removed from each carbon adsorber shall be regenerated or destroyed in a manner that prevents benzene from being emitted to the atmosphere.

(3) For each regenerative carbon adsorber, the owner or operator shall initiate regeneration of the spent carbon bed and vent the emissions from the source to a regenerated carbon bed no later than when the benzene concentration or organic vapor concentration level in the adsorber outlet vent reaches the maximum concentration point, as determined in § 61.139(h).

(4) For each non-regenerative carbon adsorber, the owner or operator shall replace the carbon at the scheduled replacement time, or as soon as practicable (but not later than 16 hours) after an exceedance of the maximum concentration point is detected, whichever is sooner.

(i) For each non-regenerative carbon adsorber, the scheduled replacement time means the day that is estimated to be 90 percent of the demonstrated bed life, as defined in § 61.139(h)(5).

(ii) For each non-regenerative carbon adsorber, an exceedance of the maximum concentration point shall mean any concentration greater than or equal to the maximum concentration point as determined in § 61.139(h).

(c) Compliance with the provisions of this section shall be determined as follows:

(1) For each carbon adsorber and vapor incinerator, the owner or operator shall demonstrate compliance with the efficiency limit by a compliance test as specified in § 61.13 and § 61.139(g). If a waiver of compliance has been granted under § 61.11, the deadline for conducting the initial compliance test shall be incorporated into the terms of the waiver. The benzene removal efficiency rate for each carbon adsorber and vapor incinerator shall be calculated as in the following equation:

$$E = \frac{\sum_{i=1}^{n} Q_{bi}C_{bi} - \sum_{j=1}^{m} Q_{aj}C_{aj}}{\sum_{i=1}^{n} Q_{bi}C_{bi}} \times 100$$

Where:

E = percent removal of benzene.

C_{aj} = concentration of benzene in vents after the control device, parts per million (ppm).

C_{bi} = volumetric flow rate in vents after the control device, standard cubic meters/minute (scm/min).

Q_{aj} = volumetric flow rate in vents after the control device, standard cubic meters/minute (scm/min).

Q_{bi} = volumetric flow rate in vents before the control device, scm/min.

m = number of vents after the control device.

n = number of vents before the control device.

(2) Compliance with all other provisions in this section shall be determined by inspections or the review of records and reports.

(d) For each regenerative carbon adsorber, the owner or operator shall install and operate a monitoring device that continuously indicates and records either the concentration of benzene or the concentration level of organic compounds in the outlet vent of the carbon adsorber. The monitoring device shall be installed, calibrated, maintained and operated in accordance with the manufacturer's specifications.

(1) Measurement of benzene concentration shall be made according to § 61.139(g)(2).

(2) All measurements of organic compound concentration levels shall be reasonable indicators of benzene concentration.

(i) The monitoring device for measuring organic compound concentration levels shall be based on one of the following detection principles: Infrared absorption, flame ionization, catalytic oxidation, photoionization, or thermal conductivity.

(ii) The monitoring device shall meet the requirements of part 60, appendix A, method 21, sections 2, 3, 4.1, 4.2, and 4.4. For the purpose of the application of method 21 to this section, the words "leak definition" shall be the maximum concentration point, which would be estimated until it is established under § 61.139(h). The calibration gas shall either be benzene or methane and shall be at a concentration associated with 125 percent of the expected organic compound concentration level for the carbon adsorber outlet vent.

(e) For each non-regenerative carbon adsorber, the owner or operator shall monitor either the concentration of benzene or the concentration level of organic compounds at the outlet vent of the adsorber. The monitoring device shall be calibrated, operated and maintained in accordance with the manufacturer's specifications.

(1) Measurements of benzene concentration shall be made according to § 61.139(g)(2). The measurement shall be conducted over at least one 5-minute interval during which flow into the carbon adsorber is expected to occur.

(2) All measurements of organic compound concentration levels shall be reasonable indicators of benzene concentration.

(i) The monitoring device for measuring organic compound concentration levels shall meet the requirements of paragraphs § 61.139(d)(2) (i) and (ii).

(ii) The probe inlet of the monitoring device shall be placed at approximately the center of the carbon adsorber outlet vent. The probe shall be held there for at least 5 minutes during which flow into the carbon adsorber is expected to occur. The maximum reading during that period shall be used as the measurement.

(3) Monitoring shall be performed at least once within the first 7 days after replacement of the carbon bed occurs, and monthly thereafter until 10 days before the scheduled replacement time, at which point monitoring shall be done daily except as specified in paragraphs (e)(4) and (e)(5) of this section.

(4) If an owner or operator detects an exceedance of the maximum concentration point during the monthly monitoring or on the first day of daily monitoring as prescribed in paragraph (e)(3) of this section, then, after replacing the bed, the owner or operator shall begin the daily monitoring of the replacement carbon bed on the day after the last scheduled monthly monitoring before the exceedance was detected, or 10 days before the exceedance was detected, whichever is longer.

(5) If an owner or operator detects an exceedance of the maximum concentration point during the daily monitoring as prescribed in paragraph (e)(3) of this section, except on the first day, then, after replacing the bed, the owner or operator shall begin the daily monitoring of the replacement carbon bed 10 days before the exceedance was detected.

(6) If the owner or operator is monitoring on the schedule required in paragraph (e)(4) or paragraph (e)(5) of this section, and the scheduled replacement time is reached without exceeding the maximum concentration point, the owner or operator may return to the monitoring schedule in paragraph (e)(3) of this section for subsequent carbon beds.

Note: This note provides an example of the monitoring schedules in paragraphs (e)(3), (e)(4) and (e)(5) of this section. Assume that the scheduled replacement time for a non-regenerative carbon adsorber is the 105th day after installation. According to the monitoring schedule in paragraph (e)(3) of this section, initial monitoring would be done within 7 days after installation, monthly monitoring would be done on the 30th, 60th and 90th days, and daily monitoring would begin on the 95th day after installation. Now assume that an exceedance of the maximum concentration point is detected on the 90th day after installation. On the replacement carbon bed, the owner or operator would begin daily monitoring on the 61st day after installation (i.e., the day after the last scheduled monthly monitoring before the exceedance was detected), according to the requirements in paragraph (e)(4) of this section. If, instead, the exceedance were detected on the first bed on the 95th day, the daily monitoring of the replacement bed would begin on the 85th day after installation (i.e., 10 days before the point in the cycle where the exceedance was detected); this is a second example of the requirements in paragraph (e)(4) of this section. Finally, assume that an exceedance of the maximum concentration point is detected on the 100th day after the first carbon adsorber was installed. According to paragraph (e)(5) of this section, daily monitoring of the replacement bed would begin on the 90th day after installation (i.e., 10 days earlier than when the exceedance was detected on the previous bed). In all of these examples, the initial monitoring of the replacement bed within 7 days of installation and the monthly monitoring would proceed as set out in paragraph (e)(3) of this section until daily monitoring was required.

(f) For each vapor incinerator, the owner or operator shall comply with the monitoring requirements specified below:

(1) Install, calibrate, maintain, and operate according to the manufacturer's specifications a temperature monitoring device equipped with a continuous recorder and having an accuracy of ±1 percent of the temperature being monitored expressed in degrees Celsius or ±0.5° C, whichever is greater.

(i) Where a vapor incinerator other than a catalytic incinerator is used, the temperature monitoring device shall be installed in the firebox.

(ii) Where a catalytic incinerator is used, temperature monitoring devices shall be installed in the gas stream immediately before and after the catalyst bed.

(2) Comply with paragraph (f)(2)(i), paragraph (f)(2)(ii), or paragraph (f)(3)(iii) of this section.

(i) Install, calibrate, maintain and operate according to the manufacturer's specifications a flow indicator that provides a record of vent stream flow to the incinerator at least once every hour for each source. The flow indicator shall be installed in the vent stream from each source at a point closest to the inlet of each vapor incinerator and before being joined with any other vent stream.

(ii) Install, calibrate, maintain and operate according to the manufacturer's specifications a flow indicator that provides a record of vent stream flow away from the vapor incinerator at least once every 15 minutes. The flow indicator shall be installed in each bypass line, immediately downstream of the valve that, if opened, would divert the vent stream away from the vapor incinerator.

(iii) Where a valve that opens a bypass line is secured in the closed position with a car seal or a lock-and-key configuration, a flow indicator is not required. The owner or operator shall perform a visual inspection at least once every month to check the position of the valve and the condition of the car seal or lock-and-key configuration. The owner or operator shall also record the date and duration of each time that the valve was opened and the vent stream diverted away from the vapor incinerator.

(g) In conducting the compliance tests required in § 61.139(c), and measurements specified in § 61.139(d)(1), (e)(1) and (h)(3)(ii), the owner or operator shall use as reference methods the test methods and procedures in appendix A to 40 CFR part 60, or other methods as specified in this paragraph, except as specified in § 61.13.

(1) For compliance tests, as described in § 61.139(c)(1), the following provisions apply.

(i) All tests shall be run under representative emission concentration and vent flow rate conditions. For sources with intermittent flow rates, representative conditions shall include typical emission surges (for example, during the loading of a storage tank).

(ii) Each test shall consist of three separate runs. These runs will be averaged to yield the volumetric flow rates and benzene concentrations in the equation in § 61.139(c)(1). Each run shall be a minimum of 1 hour.

(A) For each regenerative carbon adsorber, each run shall take place in one adsorption cycle, to include a minimum of 1 hour of sampling immediately preceding the initiation of carbon bed regeneration.

(B) For each non-regenerative carbon adsorber, all runs can occur during one adsorption cycle.

(iii) The measurements during the runs shall be paired so that the inlet and outlet to the control device are measured simultaneously.

(iv) Method 1 or 1A shall be used as applicable for locating measurement sites.

(v) Method 2, 2A, or 2D shall be used as applicable for measuring vent flow rates.

(vi) Method 18 shall be used for determining the benzene concentrations (C_{aj} and C_{bi}). Either follow section 7.1, "Integrated Bag Sampling and Analysis," or section 7.2, "Direct Interface Sampling and Analysis Procedure." A separation column constructed of stainless steel, 1.83 m by 3.2 mm, containing 10 percent 1,2,3-tris (2-cyanoethoxy) propane (TECP) on 80/100 mesh Chromosorb P AW, with a column temperature of 80° C, a detector temperature of 225° C, and a flow rate of approximately 20 ml/min, may produce adequate separations. The analyst can use other columns, provided that the precision and accuracy of the analysis of benzene standards is not impaired. The analyst shall have available for review information confirming that there

is adequate resolution of the benzene peak.

(A) If section 7.1 is used, the sample rate shall be adjusted to maintain a constant proportion to vent flow rate.

(B) If section 7.2 is used, then each performance test run shall be conducted in intervals of 5 minutes. For each interval "t," readings from each measurement shall be recorded, and the flow rate (Q_{aj} or Q_{bi}) and the corresponding benzene concentration (C_{aj} or C_{bi}) shall be determined. The sampling system shall be constructed to include a mixing chamber of a volume equal to 5 times the sampling flow rate per minute. Each analysis performed by the chromatograph will then represent an averaged emission value for a 5-minute time period. The vent flow rate readings shall be timed to account for the total sample system residence time. A dual column, dual detector chromatograph can be used to achieve an analysis interval of 5 minutes. The individual benzene concentrations shall be vent flow rate weighted to determine sample run average concentrations. The individual vent flow rates shall be time averaged to determine sample run average flow rates.

(2) For testing the benzene concentration at the outlet vent of the carbon adsorber as specified under §§ 61.139(d)(1), (e)(1) and (h)(3)(ii), the following provisions apply.

(i) The measurement shall be conducted over one 5-minute period.

(ii) The requirements in § 61.139(g)(1)(i) shall apply to the extent practicable.

(iii) The requirements in § 61.139(g)(1)(vi) shall apply. Section 7.2 of method 18 shall be used as described in § 61.139(g)(1)(vi)(B) for benzene concentration measurements.

(h) For each carbon adsorber, the maximum concentration point shall be expressed either as a benzene concentration or organic compound concentration level, whichever is to be indicated by the monitoring device chosen under § 61.139 (d) or (e).

(1) For each regenerative carbon adsorber, the owner or operator shall determine the maximum concentration point at the following times:

(i) No later than the deadline for the initial compliance test as specified in § 61.139(c)(1);

(ii) At the request of the Administrator; and

(iii) At any time chosen by the owner or operator.

(2) For each non-regenerative carbon adsorber, the owner or operator shall determine the maximum concentration point at the following times:

(i) On the first carbon bed to be installed in the adsorber;

(ii) At the request of the Administrator;

(iii) On the next carbon bed after the maximum concentration point has been exceeded (before the scheduled replacement time) for each of three previous carbon beds in the adsorber since the most recent determination; and

(iv) At any other time chosen by the owner or operator.

(3) The maximum concentration point for each carbon adsorber shall be determined through the simultaneous measurement of the outlet of the carbon adsorber with the monitoring device and method 18, except as allowed in paragraph (h)(4) of this section.

(i) Several data points shall be collected according to a schedule determined by the owner or operator. The schedule shall be designed to take frequent samples near the expected maximum concentration point.

(ii) Each data point shall consist of one 5-minute benzene concentration measurement using method 18 as specified in § 61.139(g)(2), and of a simultaneous measurement by the monitoring device. The monitoring device measurement shall be conducted according to § 61.139 (d) or (e), whichever is applicable.

(iii) The maximum concentration point shall be the concentration level, as indicated by the monitoring device, for the last data point at which the benzene concentration is less than 2 percent of the average value of the benzene concentration at the inlet to the carbon adsorber during the most recent compliance test.

(4) If the maximum concentration point is expressed as a benzene concentration, the owner or operator may determine it by calibrating the monitoring device with benzene at a concentration that is 2 percent of the average benzene concentration measured at the inlet to the carbon adsorber during the most recent compliance test. The reading on the monitoring device corresponding to the calibration concentration shall be the maximum concentration point. This method of determination would affect the owner or operator as follows:

(i) For a regenerative carbon adsorber, the owner or operator is exempt from the provisions in paragraph (h)(3) of this section.

(ii) For a non-regenerative carbon adsorber, the owner or operator is required to collect the data points in paragraph (h)(3) of this section with only the monitoring device, and is exempt from the simultaneous method 18 measurement.

(5) For each non-regenerative carbon adsorber, the demonstrated bed life shall be the carbon bed life, measured in days from the time the bed is installed until the maximum concentration point is reached, for the carbon bed that is used to determine the maximum concentration point.

(i) The following recordkeeping requirements are applicable to owners and operators of control devices subject to § 61.139. All records shall be kept updated and in a readily accessible location.

(1) The following information shall be recorded for each control device for the life of the control device:

(i) The design characteristics of the control device and a list of the source or sources vented to it.

(ii) A plan for proper operation, maintenance, and corrective action to achieve at least 98 percent control of benzene emissions.

(iii) The dates and descriptions of any changes in the design specifications or plan.

(iv) For each carbon adsorber, the plan in paragraph (i)(1)(ii) of this section shall include the method for handling captured benzene and removed carbon to comply with § 61.139(b) (1) and (2).

(v) For each carbon adsorber for which organic compounds are monitored as provided under § 61.139 (d) and (e), documentation to show that the measurements of organic compound concentrations are reasonable indicators of benzene concentrations.

(2) For each compliance test as specified in § 61.139(c)(1), the date of the test, the results of the test, and other data needed to determine emissions shall be recorded as specified in § 61.13(g) for at least 2 years or until the next compliance test on the control device, whichever is longer.

(3) For each vapor incinerator, the average firebox temperature of the incinerator (or the average temperature upstream and downstream of the catalyst bed for a catalytic incinerator), measured and averaged over the most recent compliance test shall be recorded for at least 2 years or until the next compliance test on the incinerator, whichever is longer.

(4) For each carbon adsorber, for each determination of a maximum concentration point as specified in § 61.139(h), the date of the determination, the maximum concentration point, and data needed to make the determination shall be recorded for at least 2 years or until the next maximum concentration point determination on the carbon adsorber, whichever is longer.

(5) For each carbon absorber, the dates of and data from the monitoring required in § 61.139(d) and (e), the date and time of replacement of each carbon bed, the date of each exceedance of the maximum concentration point, and a brief description of the corrective action taken shall be recorded for at least 2 years. Also, the occurrences when the captured benzene or spent carbon are not handled as required in § 61.139(b)(1) and (2) shall be recorded for at least 2 years.

(6) For each vapor incinerator, the data from the monitoring required in § 61.139(f)(1), the dates of all periods of operation during which the parameter boundaries established during the most recent compliance test are exceeded, and a brief description of the corrective action taken shall be recorded for at least 2 years. A period of operation during which the parameter boundaries are exceeded is a 3-hour period of operation during which:

(i) For each vapor incinerator other than a catalytic incinerator, the average combustion temperature is more than 28°C (50°F) below the average combustion temperature during the most recent performance test.

(ii) For each catalytic incinerator, the average temperature of the vent stream immediately before the catalyst bed is more than 28°C (50°F) below the average temperature of the vent stream during the most recent performance test, or the average temperature difference across the catalyst bed is less than 80 percent of the average temperature difference across the catalyst bed during the most recent performance test.

(7) For each vapor incinerator, the following shall be recorded for at least 2 years:

(i) If subject to § 61.139(f)(2)(i), records of the flow indication, and of all periods when the vent stream is diverted from the vapor incinerator or has no flow rate.

(ii) If subject to § 61.139(f)(2)(ii), records of the flow indication, and of all periods when the vent stream is diverted from the vapor incinerator.

(iii) If subject to § 61.139(f)(2)(iii), records of the conditions found during each monthly inspection, and of each period when the car seal is broken, when the value position is changed, or when maintenance on the bypass line valve is performed.

(j) The following reporting requirements are applicable to owners or operators of control devices subject to § 61.139:

(1) Compliance tests shall be reported as specified in § 61.13(f).

(2) The following information shall be reported on a quarterly basis. Two of the quarterly reports shall be submitted as part of the semiannual reports required in § 61.138(f).

(i) For each carbon adsorber:

(A) The date and time of detection of each exceedance of the maximum concentration point and a brief description of the time and nature of the corrective action taken.

(B) The date of each time that the captured benzene or removed carbon was not handled as required in § 61.139 (b)(1) and (2), and a brief description of the corrective action taken.

(C) The date of each determination of the maximum concentration point, as described in § 61.139(h), and a brief reason for the determination.

(ii) For each vapor incinerator, the date and duration of each exceedance of the boundary parameters recorded under § 61.139(i)(6) and a brief description of the corrective action taken.

(iii) For each vapor incinerator, the date and duration of each period specified as follows:

(A) Each period recorded under § 61.139(i)(7)(i) when the vent stream is diverted from the control device or has no flow rate;

(B) Each period recorded under § 61.139(i)(7)(ii) when the vent stream is diverted from the control device; and

(C) Each period recorded under § 61.139(i)(7)(iii) when the vent stream is diverted from the control device, when the car seal is broken, when the valve is unlocked, or when the valve position has changed.

(iv) For each vapor incinerator, the owner or operator shall specify the method of monitoring chosen under § 61.139(f)(2) in the first quarterly report. Any time the owner or operator changes that choice, he shall specify the change in the first quarterly report following the change.

(3) If, for a given quarter in which no semiannual report is due under § 61.138(f), there is no information to report under § 61.139(j)(2)(i)(A), (j)(2)(i)(B), (j)(2)(ii)(A), and (j)(2)(ii)(B), then the owner or operator may submit a statement to that effect along with the information to be reported under § 61.139(j)(2)(i)(C) in the next semiannual report, rather than submitting a report at the end of the quarter.

(Approved by the Office of Management and Budget under control number 2060–0185)

[FR Doc. 91–22621 Filed 9–18–91; 8:45 am]

BILLING CODE 6560–50–M

40 CFR Part 228

[FRL–4010–2]

Ocean Dumping; Designation of Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA today is designating a dredged material disposal site located offshore of the mouth of the Chetco River, Oregon, for the disposal of dredged material removed from the federal navigation project at the Chetco River, Oregon, and for materials dredged during other actions authorized by Section 103 of the Marine Protection, Research, and Sanctuaries Act of 1972 (MPRSA). This action is necessary to provide an acceptable ocean dumping site for the current and future disposal of this material. This site designation is for an indefinite period of time, but the site is subject to continuing monitoring to insure that unacceptable, adverse environmental impacts do not occur.

EFFECTIVE DATE: September 19, 1991.

FOR FURTHER INFORMATION CONTACT: John Malek, 206/553–1286.

SUPPLEMENTARY INFORMATION:

A. Background

Section 102(c) of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 33 U.S.C. 1401 *et seq.* ("the Act"), gives the Administrator the authority to designate sites where ocean dumping may be permitted. On October 1, 1986, the Administrator delegated the authority to designate ocean dumping sites to the Regional Administrator of the Region in which the site is located. This site designation is being made pursuant to that authority.

The EPA Ocean Dumping Regulations (40 CFR chapter I, subchapter H, § 228.4) state that ocean dumping site will be designated by publication in part 228. A list of "Approved and Final Ocean Dumping Sites" was published on January 11, 1977 (42 FR 2461 *et seq.*) and was last updated on February 2, 1990 (55 FR 3688 *et seq.*). That list established this site an interim site.

B. EIS Development

Section 102(c) of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*, (NEPA) requires that Federal agencies prepare an Environmental Impact Statement (EIS) on proposals for legislation and other major Federal actions significantly

affecting the quality of the human environment. The object of NEPA is to build into agency decision-making processes careful consideration of all environmental aspects of proposed actions. While NEPA does not apply to EPA activities of this type, EPA has voluntarily committed to prepare EIS's in connection with ocean dumping site designations such as this, 39 FR 16186 (May 7, 1974).

EPA prepared a draft and final EIS entitled "Chetco, Oregon, Dredged Material Disposal Site (ODMDS) Designation". Three letters of comment were submitted, which EPA assessed and responded to in the final EIS. As a separate but concurrent action, a notice of availability of the final EIS was published in the **Federal Register**. Anyone desiring a copy of the final EIS may obtain one from the address given above.

The action discussed in the final EIS is designation for continuing use of an ocean disposal site for dredged material. The purpose of the designation is to provide an environmentally acceptable location for ocean disposal of dredged material. The appropriateness of ocean disposal is determined on a case-by-case basis as part of the process of issuing permits for ocean disposal.

The final EIS provides documentation to support designation of an ocean dredged material disposal site (ODMDS) for continuing use to be located in the Pacific Ocean off the mouth of the Chetco River, in the State of Oregon. The designated ODMDS is the existing interim site located one mile south of the mouth of the Chetco River. Site designation studies were conducted by the Portland District, Corps of Engineers, in consultation with EPA, Region 10. This ODMDS is located in the area best suited for dredged material disposal in terms of environmental and navigational safety factors. No significant or long-term adverse environmental effects are predicted to result from the designation. The designated ODMDS would continue to receive sediments dredged by the Corps of Engineers to maintain the federally authorized navigation project at the Chetco River, Oregon, and for disposal of materials dredged during other actions authorized in accordance with section 103 of MPRSA. Before any disposal may occur, a specific evaluation by the Corps must be made using EPA's ocean dumping criteria. EPA makes an independent evaluation of the proposal and has the right to disapprove the actual disposal.

The study and final designation process were conducted in accordance with the Act, the Ocean Dumping Regulations, and other applicable Federal environmental legislation.

C. Site Description

On April 10, 1990, EPA proposed designation of the Chetco ODMDS for the continuing disposal of dredged material. The public comment period for the proposed rule and draft EIS were concurrent and closed on May 25, 1990. Three letters of comment were received commenting on the draft EIS. No comments were received specifically referencing the proposed rule. These comments were responded to in the final EIS. The comments requested clarification and were not considered substantive. No one raised serious concerns regarding designation of management of the Chetco site. During the time between the draft EIS and the final EIS, additional species were added to the list of threatened and endangered species and reauthorization of the Coastal Zone Management Act (CZMA) occurred. Consultation with the National Marine Fisheries Service on the newly listed species resulted in a determination that designation and use of the ODMDS would not affect any listed species which is described in the final EIS. Additional coordination also occurred with the coastal zone management agency for the State of Oregon regarding federal consistency.

The proposed site is located approximately 1 mile offshore of the Chetco River entrance and occupies an area of about 74 acres (0.09 square nautical miles). Water depths within the area average 21 meters. The coordinates of the site (NAD 83) are as follows:

42°01′55″ N.	124°16′37″ W.
42°01′55″ N.	124°16′13″ W.
42°01′37″ N.	124°16′13″ W.
and	
42°01′37″ N.	124°16′37″ W.

If at any time disposal operations at the site cause unacceptable adverse impacts, further use of the site will be restricted or terminated.

D. Regulatory Requirements

Five general criteria are used in the selection and approval of ocean disposal sites for continuing use. Sites are selected so as to minimize interference with other marine activities, to keep any temporary perturbations from the dumping from causing impacts outside the disposal site, and to permit effective monitoring to detect any adverse impacts at an early stage. Where feasible, locations off the Continental Shelf are chosen. If at any time disposal operations at a site cause unacceptable adverse impacts, the use of that site will be terminated as soon as suitable alternate disposal sites can be designated. The general criteria are given in § 228.5 of the EPA Ocean Dumping Regulations, and § 228.6 lists eleven specific factors used in evaluating a proposed disposal site to assure that the general criteria are met.

The site, as discussed below under the eleven specific factors, is acceptable under the five general criteria, except for the preference for sites located off the Continental Shelf. EPA has determined, based on the information presented in the EIS, that a site off the Continental Shelf is not feasible and that no environmental benefits would be obtained by selecting such a site instead of that proposed in this action. Historical use at the existing site has not resulted in substantial adverse effects to living resources of the ocean or to other uses of the marine environment.

The characteristics of the proposed site are reviewed below in terms of the eleven factors.

1. *Geographical position, depth of water, bottom topography, and distance from coast.* 40 CFR 228.6(a)(1). The site in 50 to 70 feet (15–21 m) of water, approximately 1.0 nautical mile offshore of the entrance to the Chetco River. Coordinates are:

42°01′55″ N.	124°16′37″ W.
42°01′55″ N.	124°16′13″ W.
42°01′37″ N.	124°16′13″ W.
and	
42°01′37″ N.	124°16′37″ W.

The site's center line is on a 270 degree azimuth from the mouth of the Chetco River. Bottom topography within the site is varied.

2. *Location in relation to breeding, spawning, nursery, feeding, or passage areas of living resources in adult and juvenile phases.* 40 CFR 228.6(a)(2). Aquatic resources at and near the site are described in detail in Appendix A of the EIS. The existing disposal site is located in the nearshore area and many nearshore pelagic organisms occur in the water column over the site. These include zooplankton (copepods, euphausiids, pteropods, and chaetognaths) and meroplankton (fish, crab and other invertebrate larvae). These organisms generally display seasonable changes in abundance. Since they are present over most of the coast, those from Chetco are not critical to the overall coastal population. Based on evidence from previous zooplankton and larval fish studies, it appears that there will be no impacts to organisms in the water column. The site is also adjacent to neritic reefs and haystack rocks. These reefs are unusual features along the coast and support a variety of aquatic organisms, including bull kelp (*Nerocystis lutkeana*) and its associated

fish and invertebrate community. Recently, the Oregon Department of Fish and Wildlife (ODFW) has identified a squid spawning area offshore of the disposal site.

Based on the analysis of benthic samples collected from the Chetco disposal site and the adjacent areas to the north and south, the disposal site contains a benthic fauna characteristic of nearshore, sandy, wave-influenced regions common along the coasts of the Pacific Northwest. The abundance and density of the infaunal community was found to be low at the disposal site, typical of shallow, nearshore, high energy habitats. The fauna is dominated by polychaete annelids (marine worms), small crustaceans (amphipods and cumaceans), molluscs (clams and snails), and echinoderms (sand dollars). The particular species identified from the disposal site are adapted to high energy environments and are able to withstand large sediment fluxes.

The disposal site is in an area where concentrations of common murres, gulls and other marine foraging species occur. Large concentrations have been observed shoreward of the interim site extending to and within the confines of the jetties. Concentrations undoubtedly occur at the site periodically. Concentrations of shorebirds, gulls, waterfowl, and other species occur in the Chetco estuary or on adjacent beaches.

Portland District requested an endangered species listing for the ODMDS from U.S. Fish and Wildlife Service (USFWS) and National Marine Fisheries Service (NMFS) as part of their coordination of the Site Evaluation Report. At that time only the brown pelican and the gray whale were listed. Based on previous biological assessments conducted along the Oregon coast regarding impacts to the brown pelican and the gray whale, it was concluded that no impact to either species is anticipated from the proposed designation and use. This information was presented in the draft EIS. Subsequently, the Corps was informed by the NMFS that they had revised their list of threatened/endangered species. Species listed by the NMFS included the gray, humpback, blue, fin, sei, right, and sperm whales; northern (Steller) sea lions; leatherback sea turtles, and Sacramento River winter run chinook salmon. A biological assessment was prepared addressing the newly listed species and revising previous biological assessment on the gray whale. The assessment concluded that no impact to any of the species is anticipated by designation and use of the Chetco ODMDS. This information is presented in appendix F of the EIS, including a letter of concurrence from NMFS.

In summary, the proposed ODMDS contains living resources that could be affected by disposal activities. Evaluation of past disposal activities do not indicate that unacceptable adverse effects to these resources have occurred. There is no evidence that past disposal has seriously impacted the resources in proximity to the interim site. Accordingly, this site is considered an acceptable site for designation.

3. *Location in relation to beaches and other amenity areas.* 40 CFR 228.6(a)(3). Due to depth of disposal operations and the presence of the south reef, there is little possibility of beach nourishment by natural onshore movement of dredged material from the existing site. Summer wave conditions may transport some sediment from the site shoreward and south, but the limiting depth for this movement is probably 40 to 50 feet (12–15 m) mean lower low water. The majority of disposal material is deeper than 50 feet, so shoreward transport of dredged material is unlikely.

4. *Types and quantities of wastes proposed to be disposed of, and proposed methods of release, including methods of packing the waste, if any.* 40 CFR 228.6(a)(4). The proposed disposal site will continue to receive dredged materials transported by either government or private contractor hopper dredges. The current dredges available for use at Chetco have hopper capacities from 800 to 1,500 cubic yards. Barges have a greater capacity, up to 4,000 cubic yards, but have not been routinely used at this project in the past. This would be the range in volumes of dredged material disposed of in any one dredging/disposal cycle. The approximately 48,000 cubic yards estimated to be removed annually from the Chetco project can be placed at the site in one dredging season by any combination of private and government plants. The dredges would be under power and moving while disposing. This allows the ship to maintain steerage.

The material dredged consists of medium to fine grain marine sands and coarser materials, including gravels and cobbles (Appendix C of the EIS provides detailed grain size information for the disposal area and the dredged area). These materials are predominant throughout the entire project length, RM 0 to 2.8. The materials are very similar to bottom materials at the site and the entire nearshore area. All sediments destined for ocean disposal are subject to specific evaluation, including independent review by EPA. Past sediments discharged at the interim site have typically met the exclusion criteria (40 CFR 227.13(b)).

5. *Feasibility of surveillance and monitoring.* 40 CFR 228.6(a)(5). The proximity of the disposal site to shore facilities creates an ideal situation for shore-based monitoring of disposal activities. There is, routinely, a Coast Guard vessel patrolling entrance and nearshore areas, so surveillance can also be accomplished by surface vessel.

Following designation of ODMDS, EPA, Region 10, and the Corps District develop a site management plan which addresses the need for post-disposal monitoring. All Oregon ODMDS are periodically monitored jointly by the Corps and EPA already. Several research groups are available in the area to perform any required work. The work could be performed from small surface research vessels at a reasonable cost.

6. *Dispersal, horizontal transport and vertical mixing characteristics of the area, including prevailing current direction, and velocity.* 40 CFR 228.6(a)(6). The sediments dredged from the Chetco River entrance are predominantly marine sands and fluvial gravels. These are generally similar to sediments at the disposal site. Under winter wave conditions common to this part of the Pacific Coast, the sand component is highly mobile to a depth of 90–120 feet (27–37 m). Summer wave conditions commonly mobilize sands to a depth of 40–60 feet (12–18 m). Studies at Coos Bay show wave-generated currents can move this size sediment over 60 percent of the time during summer and winter and over 50 percent of the time during spring and fall. While waves are responsible for resuspending bottom sediments, including dredged materials, it is the long-term mean current that determines the extent and direction of dispersal. While some winter storms would move gravels at the disposal site, these coarse sediments do not migrate very far away from the site and probably stay in the general area where they have been disposed.

The nearshore mean circulation is alongshore, closely paralleling the bathymetric contours, with a lesser onshore-offshore component. Circulation patterns are variable with season and weather conditions. In winter, the general shelf circulation is to the north, although short periods of southerly flow occur. Coos Bay studies suggest that offshore flow is more common in winter. This would indicate a tendency for sediment in the disposal site to move north and west under winter circulation conditions. During the

remainder of the year, flow is southerly with lower current velocities than in winter. Periodic changes in summer wind direction lead to episodes of upwelling in which near-shore ocean water transport causes a compensating near-bottom onshore flow. These upwelling events occur between April and July and continue for several days at a time. Near-bottom flow in the vicinity of the disposal site during summer should be generally southerly with onshore/offshore flow varying due to local wind conditions.

7. *Existence and effects of current and previous discharges and dumping in the area (including cumulative effects).* 40 CFR 228.6(a)(7). Appendix B of the EIS gives annual volumes of materials disposed for the last 10 years. On the average, 48,000 cubic yards have been annually disposed. Future volumes are expected to be similar; although probably showing some increase as other disposal options are exhausted.

Sidescan sonar of the disposal site and adjacent areas shows an area of coarse sand/gravel covering about half of the site and extending north and west of the site up to 1200 feet (31 m), both offshore and toward the river entrance. This is most likely an accumulation of the coarser dredged material fractions that have remained in the same general area since disposal. There are no bathymetric anomalies associated with this deposit (no mounding). The feature will persist as long as coarse sediments are disposed in this area. This has not caused adverse impacts on habitat, however, since the overall area is characterized by a wide range of bottom types.

No biological information has been found to exist regarding the interim site prior to any disposal having occurred. It is expected that no significant impacts to the interim site have occurred beyond the yearly, site-specific effects of past disposals. Oregon Department of Fish and Wildlife biologists have recommended that the site be left at its present location.

Sediments disposed in the past have been physically similar to the sample collected in close proximity to the disposal site, and have met the exclusion criteria. Elutriate analysis performed in the past show minimal contaminant releases during this simulated disposal operation with receiving water from the interim disposal site.

8. *Interference with shipping, fishing, recreation, mineral extraction, desalination, fish and shellfish culture, areas of special scientific importance, and other legitimate uses of the ocean.* 40 CFR 228.6(a)(8). The EIS identified no legitimate uses of the ocean that would be interfered with as a result of designation of an ODMDS or its use. The following paragraphs summarize conclusions:

Commercial Fishing: Two active commercial fisheries occur in the inshore area, salmon trolling and Dungeness crab fishing. The length of the salmon fishing season varies each year depending upon the established quota; however, it normally extends from July to September. During this period, the potential exists for conflicts between the dredge and fishing boats. The Coast Guard and ODFW indicated that they were unaware that this had ever been a problem. The Dungeness crab season is from December 1 to August 15 each year; however, most of the fishing is done prior to June and usually ends early because of the increase in soft shell crabs in the catch which are not marketable. As a result, most crab fishing occurs outside of the normal dredging season and it is unlikely that a conflict would result. ODFW has identified a potential squid fishery offshore from the existing site. No fishery exists at present, but stocks may be sufficient to support a fishery if a market develops. There are no existing commercial fish or shellfish aquaculture operations that would be impacted by continued use of the existing disposal site.

Recreational Fishing: Recreational fishing opportunities are extensive and varied in the Chetco area. The small boat harbor is used extensively in the summer by recreational fishermen. Private party and charter boat recreational fishing for both salmon and rock and reef fish occur. The salmon fishing season coincides with the commercial season and extends from early summer until the quota for the area is reached. Recreational fishing boats have a potential for conflicting with dredging operations; however, none have been reported to date. It is unlikely that any significant conflict will develop in the near future.

Offshore Mining Operations: All considerations for offshore mining and oil/gas leases are in the development stages. The disposal site is not expected to interfere with any of the proposed operations, as most exploration programs are scheduled for the outer continental shelf.

Navigation: No conflicts with commercial navigation traffic have been reported and none are expected, due to the light traffic in the Chetco River area. This situation is not expected to change substantially. Rock pinnacles that are navigation hazards occur nearshore and south of the ODMDS. Avoidance of these submerged and emergent pinnacles by navigation traffic and the dredges was considered during final positioning of the ODMDS

Scientific: There are no identified scientific study locations that could be impacted by the disposal site

Coastal Zone Management: In reviewing proposed ODMDS for consistency with the Coastal Zone Management (CZM) plan, they are evaluated against Oregon's Statewide Goal 19 (Ocean Resources). Local comprehensive land use plans for the Chetco area have been approved by the State of Oregon. These plans discuss ocean disposal and recognize the need to provide for suitable offshore sites for disposal of dredged materials. The requirements of the ocean dumping regulations are broad enough to meet the needs of Goal 19. Therefore, the designation of this site for ocean disposal of dredged material following the ocean dumping regulations would be consistent with Goal 19 and the State of Oregon's Coastal Zone Management Plan.

Pursuant to an EPA, Office of Water, policy memorandum dated October 23, 1989, EPA has evaluated the proposed site designation for consistency with the State's approved coastal zone management program. The State of Oregon has concurred with this determination (appendix F of final EIS). In addition, as part of the NEPA process, EPA has consulted with the State of Oregon regarding the effects of dumping at the site on the State coastal zone. EPA has taken the State's comments into account in preparing the final EIS for the site, in determining whether the proposed site should be designated, and in determining whether restrictions or limitations should be placed on use of the site.

9. *The existing water quality and ecology of the site as determined by available data or by trend assessment of baseline surveys.* 40 CFR 228.6(a)(9). Water quality off the mouth of the Chetco River is considered excellent, typical of unpolluted seawater along the Pacific Northwest coast. Water and sediment quality analyses conducted at several Oregon ODMDS are discussed in appendix C of the EIS. These studies have not shown adverse water quality impacts from ocean disposal of entrance shoal sands. The ecology of the area is discussed in appendix A in the EIS. The offshore area within and adjacent to the ODMDS is a typical northwest Pacific mobile sand community, shifting to the north and southeast to a neritic reef system. The sand communities are ubiquitous to nearshore ocean habitats

off Oregon. The site is sufficiently removed from rock and kelp habitats so that they would not be impacted by ocean disposal. Designation and use of the proposed ODMDS is not expected to have significant ecological consequences.

10. *Potentiality for the development or recruitment of nuisance species in the disposal site.* 40 CFR 228.6(a)(10). It is highly unlikely that any nuisance species could be established at the disposal site as a result of dredging and disposal activities.

11. *Existence at or in close proximity to the site of any significant natural or cultural features of historical importance.* 40 CFR 228.6(a)(11). Neritic reefs, common off the southern Oregon coast, comprise a unique ecological feature. They support a wide variety of invertebrates and fish species unique to rocky areas, as well as bull whip kelp communities. These areas are sheltered from wave action and, when receiving nutrients from both the ocean and the estuaries, are unusually productive. The ODMDS is removed from these areas.

A cultural resource literature search of the Chetco River study area did not document any wrecked vessels in the project area. This is consistent with the fact that the Chetco River historically has not been a major shipping point on the coast. Most export commodities, especially timber products, have been transported by rail and barge rather than by lumber schooner or ship. Wrecks could have occurred in the area that have not yet been discovered. However, based on previous investigations in other Oregon coastal settings (Yaquina Bay, Coquille, Columbia River Mouth), beaches, surf zones, neritic reefs, and shallow waters are the most likely areas for shipwreck occurrence. The ODMDS is removed from these areas. Also, there were no indications of wrecks from the side scan sonar survey completed during geophysical investigations.

No cultural resources impacts are expected to result from designation of the Chetco ODMDS. Existing information, along with supplementary side scan sonar data, has been reviewed by the Oregon State Historic Preservation Officer (SHPO). The SHPO letter of concurrence is included in the final EIS.

E. Action

The EIS concludes that the Chetco River site may be appropriately designated for use. The proposed site is compatible with the general criteria and specific factors used for site evaluation.

The designation of the Chetco River ODMDS as an EPA approved Ocean Dumping Site is being published as final rulemaking. Management of this site will be delegated to the Regional Administrator of EPA Region 10.

It should be emphasized that, if an ocean dumping site is designated, such a designation does not constitute or imply EPA's approval of actual disposal of material at sea. Before ocean dumping or dredged material at the site may commence, the Corps of Engineers must evaluate a permit application according to EPA's ocean dumping criteria. EPA has the right to disapprove the actual dumping, it determines that environmental concerns under the Act have not been met.

F. Regulatory Assessments

Under the Regulatory Flexibility Act, EPA is required to perform a Regulatory Flexibility Analysis for all rules which may have a significant impact on a substantial number of small entities. EPA has determined that this action will not have a significant impact on small entities since the site designation will only have the effect of providing a disposal option for dredged material. Consequently, this rule does not necessitate preparation of a Regulatory Flexibility Analysis.

Under Executive Order 12291, EPA must judge whether a regulation is "major" and therefore subject to the requirement of a Regulatory Impact Analysis. This action will not result in an annual effect on the economy of $100 million or more or cause any other effects which would result in its being classified by the Executive Order as a "major" rule. Consequently, this rule does not necessitate preparation of a Regulatory Impact Analysis.

This Rule does not contain any information collection requirements subject to Office of Management and Budget review under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

List of Subjects in 40 CFR Part 228

Water pollution control.

Dated: September 10, 1991.

Dana A. Rasmussen,

Regional Administrator for Region 10.

In consideration of the foregoing, subchapter H of chapter I of title 40 is amended as set forth below.

PART 228—[AMENDED]

1. The authority citation for part 228 continues to read as follows:

Authority: 33 U.S.C. sections 1412 and 1418.

2. Section 228.12 is amended by removing the entry for "Chetco River Entrance" from the Dredged Material Site listing in paragraph (a)(3), and by adding paragraph (b)(85) to read as follows:

§ 228.12 Delegation of management authority for interim ocean dumping sites.

* * * * *

(b) * * *

(85) Chetco River—Region 10. Location: 42°01'55"N., 124°16'37"W.; 42°01'55"N., 124°16'13"W.; 42°01'37"N., 124°16'13"W.; and 42°01'37"N., 124°16'37"W. (NAD 83).

Size: .09 square nautical miles.

Depth: 21 meters (average).

Primary Use: Dredged material.

Period of Use: Continuing use.

Restrictions: Disposal shall be limited to dredged material determined to be suitable for unconfined disposal from the Chetco Estuary and River and adjacent areas.

[FR Doc. 91-22623 Filed 9-18-91; 8:45 am]

BILLING CODE 6560-50-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

43 CFR Public Land Order 6881

[MT-930-4214-10; MTM 067221]

Withdrawal of National Forest System Lands for Protection of Recreational Values; Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Public Land Order.

SUMMARY: This order withdraws approximately 95 acres of National Forest System lands from mining for a period of 20 years to protect recreational values. The lands have been and remain open to such forms of disposition as may by law be made of National Forest System lands and to mineral leasing.

EFFECTIVE DATE: September 19, 1991.

FOR FURTHER INFORMATION CONTACT: James Binando, BLM Montana State Office, P.O. Box 36800, Billings, Montana 59107, 406-255-2935.

By virtue of the authority vested in the Secretary of the Interior by Section 204 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714 (1988), it is ordered as follows:

1. Subject to valid existing rights, the following described National Forest System lands are hereby withdrawn from location and entry under the mining laws (30 U.S.C., Ch. 2 (1988)), but not from leasing under the mineral leasing laws, to protect three Forest Service recreation areas:

Principal Meridian

Kootenai National Forest

Howard Lake Recreation Area

Unsurveyed, but when surveyed will probably be:

T. 27 N., R. 31 W.,
Sec. 13, that part of SW¼NE¼NE¼, SE¼NW¼NE¼, and SE¼NE¼, lying north of Howard Lake.

The area described contains 35 acres, more or less.

Yaak Falls Recreation Area

Unsurveyed, but when surveyed will probably be:

T. 33 N., R. 33 W.,
Sec. 8, NE¼NE¼.

The area described contains 40 acres.

Ross Creek Recreation Area

Unsurveyed, but when surveyed will probably be:

T. 28 N., R. 34 W.,
Sec. 12, S½NE¼NE¼.

The area described contains 20 acres.

The areas described above aggregate approximately 95 acres in Lincoln County.

2. The withdrawal made by this order does not alter the applicability of those public land laws governing the use of the lands under lease, license, or permit, or governing the disposal of their mineral or vegetative resources other than under the mining laws.

3. This withdrawal will expire 20 years from the effective date of this order unless, as a result of a review conducted before the expiration date pursuant to section 204(f) of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1714(f) (1988), the Secretary determines that the withdrawal shall be extended.

Dated: September 6, 1991.

Dave O'Neal,

Assistant Secretary of the Interior.

[FR Doc. 91-22526 Filed 9-18-91; 8:45 am]

BILLING CODE 4310-DN-M

NATIONAL SCIENCE FOUNDATION

45 CFR Parts 612 and 613

Amendments to Freedom of Information and Privacy Act Regulations

AGENCY: National Science Foundation (NSF).

ACTION: Final rule.

SUMMARY: The National Science Foundation is amending 45 CFR parts 612 and 613 to make technical changes in its Freedom of Information and Privacy Act regulations to account for records maintained by NSF's Office of Inspector General. The NSF also is adding a section to its Freedom of Information Act (FOIA) regulations which more fully describes NSF's existing procedures for notifying submitters of confidential commercial information that their records have been requested under the FOIA. Other amendments will increase fees for search and copying of records, and make technical changes to properly cross reference the sections of these regulations.

EFFECTIVE DATE: September 19, 1991.

FOR FURTHER INFORMATION CONTACT: D. Matthew Powell, Assistant General Counsel, NSF, Washington, DC 20550 (202-357-9435).

SUPPLEMENTARY INFORMATION: Notice of the proposed amendments to NSF's FOIA and Privacy Act regulations, inviting public comment, was published in the **Federal Register** on October 19, 1990 (55 FR 42413). Comments were received from Trends Publishing, Inc. (Trends) and The Reporters Committee for Freedom of the Press (Reporters). Trends suggested a number of revisions to NSF's proposed rule amending FOIA regulations, all of which relate to currently existing provisions of NSF's FOIA regulations, rather than to those changed by the proposed amendments. Accordingly, Trends' suggested revisions do not appear in the final rule.

Reporters commented on three aspects of the proposed amendments to FOIA regulations. First, Reporters was concerned because, under the proposed rule, FOIA requests addressed to the Office of Legislative and Public Affairs (OLPA) would not apply to records maintained by the Office of Inspector General (OIG). Reporters believes this could result in confusion and delay in obtaining OIG records. NSF has revised the proposed rule in response to this comment so that OIG records will be covered by FOIA requests addressed to OLPA.

Reporters' second comment relates to predisclosure notification procedures established by the proposed rule. These procedures require NSF to notify submitters of confidential commercial information prior to disclosure of that information. The submitters are then given an opportunity to object to the disclosure. Reporters was concerned that NSF could use the notification procedures to circumvent NSF's deadlines for responding to FOIA requests. NSF has revised the proposed rule in response to this comment to state that periods for notification and objections must be consistent with statutory requirements.

Finally, Reporters objected to the increase in NSF's photocopying fees from $0.10 to $0.25 per page, suggesting that NSF's costs do not justify the increase, and further stating that NSF could contract out its photocopying work at a cost of $0.03 to $0.05 per page. NSF believes that the charge of $0.25 cents a page reflects an average agency-wide per page charge for reproduction of documents. This charge represents the reasonable direct costs of making copies, taking into account the salaries of the operators as well as the cost of duplicating machines. NSF further believes that it would be inappropriate to send files to commercial copiers for duplication in light of the danger of lost files, and the sensitive nature of the contents of some of those files. Accordingly, § 612.10 is adopted with no change.

Under the criteria set forth in Executive Order 12291, this rule has been determined not to be a "major rule" requiring a regulatory impact analysis. It has also been determined, pursuant to the requirements of the Regulatory Flexibility Act, 5 U.S.C. 601-612, that these changes will have no significant economic impact on any substantial number of small entities.

List of Subjects in 45 CFR

Part 612

Availability of records and information.

Part 613

Privacy.

Pursuant to the authority granted by 5 U.S.C. 552a(f), NSF is amending 45 CFR, chapter IV, parts 612 and 613, by adding § 612.6 and revising other sections as indicated below.

Dated: September 13, 1991.

Lawrence Rudolph,

Deputy General Counsel.

PART 612—[AMENDED]

1. The authority for part 612 continues to read:

Authority: 5. U.S.C. 552, as amended.

2. In the table of contents for part 612 the heading for § 612.6 is added to read:

Sec. 612.6 Confidential Commercial information—notice.

3. 45 CFR part 612 is amended by adding § 612.6 and by revising §§ 612.1, 612.2(a), 612.3(b) and (c), 612.4, 612.7(a), (c), and (d), 612.8(a)(2)(ii), 612.10(a) and (d) and 612.11(a) and (c) as follows.

§ 612.1 Scope.

This part establishes procedures by which the National Science Foundation (NSF) will implement the Freedom of

Information Act, 5 U.S.C. 552(a), relating to public availability of NSF records.

§ 612.2 nformation policy.

(a) Subject to the policies set forth below, NSF will make the fullest possible disclosure of information to any person who requests information, without unnecessary expenses or delay. The Inspector General (concerning records maintained by the Office of Inspector General) or the Deputy Director (concerning all other NSF records) may, except where prohibited by law, order disclosure in the public interest of records exempt from mandatory disclosure under § 612.8 of this part.

* * * * *

§ 612.3 Procedures applicable to the public—requests and appeals.

* * * * *

(b) *Form of request.* A request need not be in any particular format, but it: (1) Must be in writing, (2) must be clearly identified both on the envelope and in the letter as a Freedom of Information Act or FOIA request, (3) must describe the records sought with sufficient specificity to permit identification, and (4) must state that the requester promptly will pay the fees chargeable under this regulation. Provided, however, that when the requester places an inadequate limit on the amount he will pay or the requester has failed to make payments for previous requests, the NSF may require advance payment in accordance with § 612.12(d) of this part except in cases when fees have been waived or reduced in accordance with § 612.13 of this part.

(c) *Place of request.* Any request for records under FOIA shall be addressed to the National Science Foundation, Office of Legislative and Public Affairs, 1800 G Street, NW., Washington, DC 20550, except that requests for records maintained by the Office of Inspector General may be addressed to either the National Science Foundation, Office of Legislative and Public Affairs, 1800 G Street, NW, Washington, DC 20550 or to the National Science Foundation, Office of Inspector General, 1800 G Street, NW, Washington, DC 20550. A request which meets the requirements of paragraph (b) of this section and is properly addressed be deemed received on the date of arrival in the Office of Legislative and Public Affairs or the Office of Inspector General.

* * * *

§ 612.4 Copies of records.

If a requested record is to be disclosed, a copy will be furnished the requester as promptly as possible provided payment of fees has been arranged, or has been waived pursuant to § 612.13 of this part. Records will not be released for copying.

§ 612.6 Confidential Commercial information—notice.

(a) *In general.* Commercial information provided to the NSF by a submitter shall not be disclosed pursuant to a Freedom of Information Act request except in accordance with this section.

(b) *Definitions.* The following definitions are used in reference to this section:

Commercial information means information provided to the NSF by a submitter that arguably is protected from disclosure under section b(4) of the Freedom of Information Act, 5 U.S.C. 552(b)(4) and § 612.8(a)(4) of this part.

Submitter means any person, organization, or entity who provides commercial information, directly or indirectly, to the NSF. The term includes, but is not limited to, corporations, state governments and foreign governments.

(c) *Designation of commercial information.* Submitters of commercial information shall use good-faith efforts to designate, by appropriate markings, either at the time of submission or within a reasonable time thereafter, those portions of their submissions which they deem to be protected from disclosure under 5 U.S.C. 552(b)(4) and § 612.8(a)(4) of this part. Such designations shall be deemed to have expired ten years after the date of the submission unless the submitter requests, and provides reasonable justification for, a designation period of greater duration.

(d) *Notice to submitters.* The NSF shall, to the extent permitted by law, provide a submitter with written notice of a Freedom of Information Act request or administrative appeal encompassing its commercial information wherever required under paragraph (e) of this section, except as provided for in paragraph (f) of this section. Such written notice, given in order to afford the submitter an opportunity to object to disclosure pursuant to paragraph (g) of this section, shall be given within a reasonable time after NSF's receipt of the Freedom of Information Act request or administrative appeal, consistent with statutory requirements, and shall either describe the exact nature of the commercial information requested or provide copies of the records or portions thereof containing the information. The requester also shall be notified that notice and an opportunity to object are being provided to a submitter.

(e) *When notice is required.* Notice shall be given to a submitter whenever:

(1) The information has been designated in good faith by the submitter as information deemed protected from disclosure under 5 U.S.C. 552(b)(4) and § 612.8(a)(4) of this part, or

(2) The NSF has reason to believe that the information may be protected from disclosure under 5 U.S.C. 552(b)(4) and § 612.8(a)(4) of this part.

(f) *Exceptions to notice requirements.* The notice requirements of paragraph (d) of this section shall not apply if:

(1) The NSF determines that the information should not be disclosed;

(2) The information lawfully has been published or has been officially made available to the public;

(3) Disclosure of the information is required by law (other than 5 U.S.C. 552); or

(4) The designation made by the submitter in accordance with paragraph (c) of this section appears obviously frivolous, except that, in such case, the NSF shall send to the submitter written notice of any final administrative decision to disclose commercial information at least ten days prior to a specified disclosure date.

(g) *Opportunity to object to disclosure.* Through the notice described in paragraph (d) of this section, the NSF shall afford a submitter a reasonable time, consistent with statutory requirements, within which to provide the NSF with a detailed written statement of any objection to disclosure. Such statement shall specify all grounds for withholding any of the information under any exemption of the Freedom of Information Act and, in the case of 5 U.S.C. 552(b)(4) and § 612.8(a)(4) of this part, shall provide a detailed description of why the information is a trade secret or commercial or financial information that is privileged or confidential. This description shall explain why release of commercial or financial information would cause substantial harm to the competitive position of the submitter. Whenever possible, the submitter's claim of confidentiality should be supported by a statement or certification by an officer or authorized representative of the submitter. Information provided by a submitter pursuant to this paragraph may itself be subject to disclosure under the FOIA. When the submitter fails to object within the specified time or the objection appears obviously frivolous, the NSF shall provide the submitter with written notice pursuant to paragraph (f)(4) of this section.

(h) *Notice of intent to disclose.* The NSF shall consider a submitter's

objections and specific grounds for non-disclosure prior to determining whether to disclose confidential information. Whenever the Foundation decides to disclose confidential information over the objection of a submitter, the NSF shall forward to the submitter a written notice which shall include:

(1) A statement of the reasons for which the submitter's disclosure objections wee not sustained;

(2) A description of the confidential information to be disclosed; and

(3) A specified disclosure date.

Such notice of intent to disclose shall be forwarded to the submitter at least ten days prior to the specified disclosure date and the requester shall be notified likewise.

(i) *Notice of FOIA lawsuit.* Whenever a requester brings suit seeking to compel disclosure of confidential information, the NSF shall promptly notify the submitter.

§ 612.7 Agency actions on receipt of a properly presented request for record.

(a) *Monitoring of requests.* The NSF Office of Legislative and Public Affairs, or such other office as may be designated by the Director, will serve as the central office for internal administration of these regulations. For records maintained by the Office of Inspector General, that Office will control incoming requests made directly to it, dispatch response letters, and maintain administrative records. For all other records maintained by NSF, the Office of Legislative and Public Affairs, or such other office as may be designated by the Director, will control incoming requests, assign them to appropriate action offices, monitor compliance, consult with action offices on disclosure, approve unavoidable extensions, dispatch denial and other letters, and maintain administrative records.

* * * * *

(c) *Records containing commercial information.* When the requested record contains confidential commercial information such as a successful proposal that was submitted to NSF, the NSF will normally contact, in accordance with § 612.6 of this part, the organization that submitted the record in order to ask whether the submitter wished portions of the records withheld under any applicable exemptions. (The Foundation protects from disclosure pending proposals or unsuccessful proposals in any case.)

(d) *Denial of request* No written request for records shall be denied except by the Director of the Office of Legislative and Public Affairs, the Office of Inspector General or such other office as may be designated by the Director. Notice of the denial of a request shall briefly set forth the reasons therefor which shall be based solely upon one or more of the exemptions specified in § 612.8 of this part. Each notice of denial shall set forth the names and title or positions of each person responsible for the denial and shall inform the requester of the right to appeal as provided in § 612.3 of this part.

* * * * *

§ 612.8 Records not available.

(a) * * *

(2) * * *

(ii) Negotiating positions and limitations involved in a negotiation prior to the execution of a contract or the completion of the action to which the negotiating positions or limitations were applicable. They may also be exempt pursuant to other provisions of this section.

* * * *

§ 612.10 Fees to be charged—general.

(a) Manual searches for records. Whenever feasible, NSF shall charge at the salary rate(s) (i.e., basic pay plus 16 percent) of the employee(s) making the search. However, where a homogeneous class of personnel is used exclusively (e.g., all administrative/clerical, or all professional/executive), NSF may establish an average rate for the range of grades typically involved. Thus, for each one-quarter hour after the first quarter hour, for search of a record by clerical personnel, the charge is $2.50. For a nonroutine, nonclerical search by professional personnel, for example, where the task of determining which records fall within a request and search requires professional or managerial time, the charge is $7.50 for each one quarter hour spent in excess of the first quarter hour.

(b) * * *

(c) * * *

(d) *Duplication of records.* NSF shall establish an average agency-wide, per-page charge for paper copy reproduction of documents. This charge shall represent the reasonable direct costs of making such copies, taking into account the salary of the operators as well as the cost of the reproduction machinery. For copies prepared by computer, such as tapes or printouts, NSF shall charge the actual cost, including operator time, of production of the tape or printout. For other methods of reproduction or duplication, NSF shall charge the actual direct costs of producing the document(s). For photocopies of documents, $0.25 per copy per page will be charged. In practice, if NSF estimates that duplication charges are likely to exceed $25, it shall notify the requester of the estimated amount of fees, unless the requester has indicated in advance his willingness to pay fees as high as those anticipated. Such a notice shall offer a requester the opportunity to confer with agency personnel with the object of reformulating the request to meet his or her needs at a lower cost.

* * * * *

§ 612.11 Fees to be charged—categories of requesters.

* * * * *

(a) *Commercial use requesters.* When a request for documents for commercial use is received, NSF shall assess charges which recover the full direct cost of searching for, reviewing for release, and duplicating the records sought. Requesters must reasonably describe the records sought. Commercial use requesters are not entitled to two hours of free search time nor 100 free pages of reproduction of documents. NSF may recover the cost of searching for and reviewing records even if there is ultimately no disclosure of records (see § 612.12(b) of this part).

(b) * * *

(c) *Requesters who are representatives of the news media.* NSF shall provide documents to requesters in this category for the cost of reproduction alone, excluding charges for the first 100 pages. To be eligible for inclusion in this category a requester must meet the criteria in § 612.9(j) of this part, and his request must not be made for a commercial use. In reference to this class of requester, a request for records supporting the news dissemination function of the requester shall not be considered to be a request that is for commercial use. Requesters must reasonably describe the records sought.

* * * * *

PART 613—[AMENDED]

1. The authority for part 613 continues to read:

Authority: 5 U.S.C. 552a(f).

2. 45 CFR part 613 is amended by revising § 613.4(c) as follows:

§ 613.4 Correction of records.

* * * * *

(c) The Privacy Act Officer upon the receipt of such a request shall promptly confer with the Directorate or office within the NSF responsible for the record. If the Privacy Act Officer finds that correction is not warranted in whole or in part, the matter shall be brought to the attention of the Inspector General, if it pertains to records maintained by the Office of Inspector

General, or to the attention of the General Counsel, if it pertains to other records. If, after review by the General Counsel or by the Inspector General and discussion with the requester if deemed helpful, it is determined that correction as requested is not warranted, a letter shall be sent by the Privacy Act Officer to the requester denying his request and/or explaining what correction might be made if agreeable to the requester. This letter shall set forth the reasons for the refusal to honor the request for correction. It shall also inform him of his right to appeal this decision and include a description of the appeals procedure set forth in paragraph (d) of this section. Such letter or notification that the desired correction will be made shall normally be sent within 30 working days of the receipt of a properly addressed request (or within 30 working days of the time the Privacy Act Officer becomes aware that a particular communication not addressed as prescribed above is a request for correction of a record under the Privacy Act).

* * * * *

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 216 and 247

[Docket No. 910777-1177]

Taking and Importing of Marine Mammals; "Dolphin Safe" Tuna Labeling

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Interim final rule with request for comments.

SUMMARY: This rule implements the Dolphin Protection Consumer Information Act (DPCIA) by: (1) Identifying the fish and fish products, described by Harmonized Tariff Schedule item number, subject to importation requirements mandated by the Marine Mammal Protection Act (MMPA), as amended by the DPCIA; (2) specifying the use and contents of a new NOAA form, Fisheries Certificate of Origin, required to import into the United States certain fish and fish products potentially harvested with methods injurious to marine mammals; (3) requiring importers of certain fish and fish products harvested by nations that engage in high seas large-scale driftnet fishing to provide certification by a responsible government official of the harvesting nation that the items to be imported were not harvested with large-scale driftnets in certain areas of the high seas; and (4) regulating the use of labels suggesting that tuna products are "dolphin safe."

DATES: This interim final rule is effective September 19, 1991, except §§ 216.24(e)(3) and 247.4, both of which contain collection-of-information requirements subject to the Paperwork Reduction Act and which are not effective until approved by the Office of Management and Budget (OMB). Notice of the effective dates for §§ 216.24(e)(3) and 247.4 will be published in the **Federal Register.**

Comments are invited and must be received on or before January 1, 1992.

ADDRESSES: Comments should be mailed to, and the Regulatory Impact Review may be obtained from, E.C. Fullerton, Director, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal island, CA 90731.

FOR FURTHER INFORMATION CONTACT: E.C. Fullerton, Director, Southwest Region, National Marine Fisheries Service, 213-514-6196.

SUPPLEMENTARY INFORMATION: In the eastern tropical Pacific Ocean (ETP), schools of yellowfin tuna frequently swim beneath schools of dolphin. Some commercial fishing operations use this relationship to harvest yellowfin tuna by encircling dolphin with purse seine nets; in the process, dolphin often become entangled in the nets and die or are injured. In other parts of the world, large-scale driftnets are deployed to harvest tuna, salmon, squid, and other species. Large-scale driftnet fishing means using a gillnet composed of a panel or panels of webbing, or a series of such gillnets, with a total length of 2.5 kilometers (km) or more, which is placed in the water and allowed to drift with the currents and winds for the purpose of entangling fish in the webbing. In addition to capturing the target species, these nets indiscriminately entangle other species of fish, as well as birds and marine mammals, resulting in death and injury.

In the ETP, U.S. tuna vessels are currently required to carry NMFS observers on fishing trips to document fishing operations and to report dolphin mortalities, which are limited by annual quota. The Assistant Administrator for Fisheries, NOAA (Assistant Administrator) has determined that purse seine vessels of 400 short tons (362.9 metric tons) carrying capacity or greater are, for purposes of the MMPA and its implementing regulations, the only type of purse seine vessels that are capable of deploying their nets on or to encircle dolphin. All references in this rule to purse seine vessels concern only this type of vessel. Foreign tuna purse seine vessels carry Inter-American Tropical Tuna Commission (IATTC) observers during trips in the ETP to monitor fishing operations and dolphin mortalities. Information from the observer logs is used by the participating nations to ensure that their fleets comply with applicable regulatory programs, and to document that their fleet mortality rates are comparable to the U.S. fleet's mortality rates. Such data are needed for importation of yellowfin tuna and tuna products into the United States. In order to import their fish into the United States, certain nations have adopted laws prohibiting intentional purse seine settings on dolphin and requiring IATTC observers on all fishing trips in the ETP (currently, Panama and Ecuador).

Various living marine resources of interest to the United States, some of which are already listed among the world's threatened and endangered species, are killed in the large-scale driftnet fisheries either as target species or incidentally. The United States is a primary sponsor of United Nations General Assembly Resolution 44/225, which recommends (1) a moratorium on all large-scale, pelagic driftnet fishing by June 30, 1992, and (2) immediate action to encourage cessation of large-scale pelagic driftnet fishing in the South Pacific region by July 1, 1991.

On November 28, 1990, the President signed into law the Fishery Conservation Amendments of 1990 (Pub. L. 101-627, 104 Stat. 4436). Title IX of the Amendments, called the Dolphin Protection Consumer Information Act (DPCIA): (1) Regulates the use of labels suggesting that tuna is "dolphin safe," defining misuse of such labels as an unfair or deceptive trade practice; (2) amends the MMPA to require documentation regarding the use of large-scale driftnets for the importation of certain fish products; and (3) authorizes civil penalties for knowing and willful false statements that are submitted to document the authenticity of "dolphin safe" labels on tuna products. This rule is intended to implement the DPCIA.

Fish and Fish Products Subject to this Rule

At 50 CFR 216.24(e)(2)(i) was a list of U.S. Harmonized Tariff Schedule item numbers (HTS numbers) that described various types of yellowfin tuna and tuna products. NMFS has modified this list to

reflect those imported products now known to be harvested with purse seines in the ETP. All forms of fresh tuna have been removed from the list. Fresh tuna is not imported from the ETP purse seine fishery or the large-scale driftnet fishery. These are distant-water fisheries, which are unable to provide fresh, high quality products to the fresh-fish market. NMFS has determined from a review of Yellowfin Certificates of Origin that fresh tuna enters the United States in small quantities, by air shipment, from coastal artisanal longline fisheries.

At 50 CFR 216.24(e)(2)(ii), NMFS has added a list of tuna and tuna products exported to the United States and known to be harvested with large-scale driftnets on the high seas. In particular, frozen and canned forms of albacore tuna and bluefin tuna have been added.

The procedure in 50 CFR 216.24(e)(2)(i)(C), under which the Director, Southwest Region, NMFS, had been authorized to exempt certain types of canned tuna from the import restrictions if marked "other than yellowfin tuna" is eliminated by this interim final rule. This exemption is no longer appropriate because, under this regulation, tuna other than yellowfin may be subject to import restrictions if it is of a type potentially caught in large-scale driftnets.

In addition to the HTS numbers for tuna and tuna products discussed above, certain other fish and fish products are known to be taken with large-scale driftnets. The HTS numbers that appear in 50 CFR 216.24(e)(2)(iii) include those for species of fish and squid known to be taken in large-scale driftnets and exported to the United States. The species list of fish and squid was obtained from observer records compiled aboard Japanese, Korean, and Taiwanese large-scale driftnet vessels. A series of codes for "marine fish, unspecified," also has been added to cover certain product forms of shark and marlin and other species of billfish that are known to be harvested with large-scale driftnet and exported to the United States from driftnetting nations. The HTS numbers for halibut, previously included in 50 CFR 216.24(e)(2)(ii), have been removed, because halibut are not harvested in large-scale driftnets. HTS numbers for fresh and chilled fish are not included because, when imported, these products are not derived from fish caught by driftnet. Although this list is thought to be complete, NMFS will monitor all incoming shipments of fish and will add appropriate HTS numbers upon determining that additional ETP purse seine or large-scale driftnet products that have not been included here are entering the United States. References in this rule to fish, products, or HTS items subject to this rule mean fish or products described by the HTS numbers in 50 CFR 216.24(e)(2) (i), (ii), and (iii).

Fisheries Certificates of Origin

Under current regulations, NMFS requires a "Yellowfin Tuna Certificate of Origin" (Standard Form 370–1) for imports of most types of yellowfin tuna. This certificate, signed by the vessel captain, owner's representative, cannery representative, or an official of the harvesting nation, accompanies each shipment of yellowfin to the United States, and allows the U.S. Customs Service to identify and prohibit entry of yellowfin tuna and tuna products that are not in compliance with U.S. regulations.

The "Yellowfin Tuna Certificate of Origin" has been modified by this rule to become a "Fisheries Certificate of Origin" (NOAA Form 370) (Certificate). A Certificate must accompany all imported shipments of an item with an HTS number for: (1) Tuna subject to this rule, and (2) fish, other than tuna, subject to this rule, if harvested with or imported from a large-scale driftnet nation. The newly revised forms identify the type and quantity of fish, the importer and exporter, the method of harvest (longline, purse seine, large-scale driftnet, other type of gillnet, etc.), the ocean area of harvest, the dates that the fishing trip began and ended, and the flag of the harvesting vessel. The first exporter of the shipment must certify the accuracy of the information provided on the Certificate. For purposes of the exporter's certification, the first exporter is considered the person or company that first exported the shipment, or, in the case of Certificates used to authenticate a "dolphin safe" label on shipments originating in the United States, the first seller of the product.

For each fish or fish products harvested by a vessel of a nation identified as using large-scale driftnets, a responsible government official of the harvesting nation must certify that the shipment was not harvested with large-scale driftnet. This certification may be provided either on a designated section of the Certificate itself or by separate attachment.

For tuna products using a "dolphin safe" label, each exporter, importer, and processor of the product is required to endorse the Certificate, acknowledging that the observer and captain's certificates, as well as the Certificate itself, accurately describe the accompanying shipment. Certain additional documents that are required for tuna products with labels suggesting "dolphin safe" (e.g., observer "dolphin safe" certification, skipper "dolphin safe" certification, etc.) can be noted on and attached to the Certificate.

The Fisheries Certificate of Origin supersedes the Yellowfin Certificate of Origin. The current requirement for the Yellowfin Certificate of Origin is well known throughout the domestic and international industry. It is anticipated that this modification in the documentation requirements will place very little additional burden on exporters and importers.

Labeling Requirements For Tuna Products

On April 12, 1990, the three major U.S. tuna canners announced they would no longer purchase tuna caught in association with marine mammals, and began placing "dolphin safe" logos on their labels. At the request of the U.S. canners, NMFS and IATTC agreed to provide certificates or other documentation from observer records to confirm that tuna caught during particular trips were not intentionally taken in association with dolphin. Under this voluntary certification procedure, the only ETP tuna sold on the U.S. market is tuna harvested during trips monitored by official observers. Although purse-seine-caught yellowfin tuna from the ETP could be adequately documented, there is no system in place to provide observer certificates for the driftnet fleet.

The DPCIA provides a standard definition for "dolphin safe," defines as unlawful the misuse of labels suggesting a product is "dolphin safe," and provides specific penalties for making false statements or endorsements used to authenticate a "dolphin safe" label. The DPCIA prohibits, as a violation of section 5 of the Federal Trade Commission Act (FTCA), any producer, importer, exporter, distributor, or seller of any tuna product exported from or offered for sale in the United States from including on the label any term or symbol, such as "dolphin safe," that claims or suggests that a tuna product was harvested in a manner not harmful to dolphins, except under certain specifically delineated circumstances. Specifically, use of a label connoting "dolphin safe" is considered a violation of the FTCA if affixed to a tuna product harvested: (1) Anywhere on the high seas by a vessel that uses driftnets, or (2) in the ETP, if there is no accompanying documentation, signed by the vessel captain, an observer, all

exporters, all importers, and all processors, certifying that no purse seine nets were intentionally deployed on dolphins during the fishing trip on which the tuna were harvested. Section 5 of the FTCA, declares unlawful "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce"(15 U.S.C. 45(a)(1)) and provides enforcement mechanisms to ensure compliance.

These labeling requirements will apply only to labels, written or graphic, affixed to tuna "products." Tuna products are defined as processed food items, intended for human or animal consumption, sold on the retail market, and containing fish or fish products subject to this rule. These requirements specifically do not apply to perishable food items with a shelf life of less than 3 days.

The purpose of these new labeling rules is to assist consumers who would like to know if the tuna products they purchase are accurately labeled. The public can be assured that a product is accurately labeled "dolphin safe" only if a system is established to chronicle the source of all tuna products. First, there must be reliable certification that the tuna were not harvested in a manner harmful to dolphins. Second, a tracking system must be established to ensure that product integrity is maintained after it leaves the fishing vessel for processing. Third, labeling standards must be strictly maintained.

There are several existing mechanisms required by U.S. Food and Drug Administration (FDA) regulations for tracking products, particularly canned products, to their source. This is done to monitor product quality and safety, as well as to ensure that the product truly is what it is claimed to be. In order to minimize the expenses of the Federal Government, NMFS is relying to the maximum extent possible on the existing tracking system. However, the existing system will not satisfy entirely the new requirements imposed by the DPCIA, which mandates that certain documents accompany labeled tuna products. Therefore, additional documentation requirements are being imposed, as described below.

In the case of processed tuna labeled "dolphin safe," if the product is processed in a foreign nation, the Fisheries Certificate of Origin, in lieu of accompanying the product until it is offered for sale or export from the United States, may be collected by the U.S. Customs Service, and will subsequently be sent to NMFS. If the product is processed in the United States, the processor may endorse and forward the Certificate to NMFS, assuming all required endorsements have been made. If the product is exported from the United States, the Certificate may be submitted to NMFS or to the U.S. Customs Service at the time of export.

The documentation sent to NMFS will be reviewed and entered into a database, and the Certificate and other documents will be archived. The database will be used to monitor vessels, catches by quantity and area, and to compare the listed carrying capacity of the vessel with the quantity claimed on the Certificate.

Tuna destined for consumption in the United States is processed in the United States, Puerto Rico, American Samoa, and throughout the world. Many processors have already established certification procedures to ensure that tuna products destined for the U.S. market are "dolphin safe." These procedures however, vary from processor to processor.

Generally, fresh or frozen tuna that are unloaded from a fishing vessel or transport vessel are identified by "lot" according to the order in which they are removed from the wells of the vessel. "Dolphin safe" lots are accompanied by copies of the "dolphin safe" certification. All lots are accompanied by shipping documentation that allows the processor to determine the date the lot was unloaded from the harvesting vessel, the name of the vessel, and the quantity and species.

At the cannery, processors keep the "dolphin safe" tuna separate from any tuna that is not "dolphin safe." Very complete and accurate records on processing and labeling of tuna are required by the FDA pursuant to parts 101 and 108, and §§ 113.100 and 161.91 of title 21 CFR. Each lot of fish (there may be several lots from the same vessel) is labeled, stored, and processed separately. Records are maintained by each shift supervisor to record the specific lots of fish that are processed on each processing line. Although different lots of fish may be combined at the canning stage, the required records must indicate which lots of tuna are combined under the same can codes. These records include such information as product, code number, date of processing, processing system number, size of container, number of containers per coding interval, and other appropriate data. The records must be kept for 3 years after processing.

Can codes are stamped onto every can of tuna (either embossed into the metal lid or stamped with indelible ink) during processing, to allow the manufacturer to effect a recall of any product, as required by 21 CFR 113.60(c). Although these codes are different for each manufacturer, all contain essentially the same information to meet the requirement of the above regulation: The plant or location of processing; the product contained therein; the year, month and day it was processed; the "packing line" in the factory; and the period or shift that it was processed. Codes are limited to specific intervals of time during processing, not to exceed a period of more than one personnel shift. In addition, the can code often contains information about the type of pack (solid, flake, etc.), the type of meat (white, light, etc.), the species and whether it is "dolphin safe" or not, and other information, such as can size and packing medium (oil, water, etc.). Using the can code from a can of tuna in the supermarket, it is possible to track back through the processing system to determine not only the date on which it was processed, but also the shift.

Each shift is required by 21 CFR 113.100 to complete a packing report for each lot of fish that is processed. Again, there are specific requirements for the packing report, relating to the procedures used as the fish is processed, but the most important item for use in tracking the source of the tuna is the lot number of the fish. From the lot number it is possible to determine the invoice or purchase documentation, the date the tuna was delivered to the dock and the vessel from which the tuna was unloaded. Observer certificates and the Certificate of Origin can be reviewed to determine where and how the tuna was harvested, and if it is indeed "dolphin safe."

To summarize the paper trail: The can code links the tuna to a processing line, date, and time; the packing and processing reports required by the FDA link the tuna to a lot number; and the lot number links the tuna to a delivered shipment from a vessel, a Fisheries Certificate of Origin, observer and captain's certificate, and invoice.

In an effort to determine the efficiency of this tracking system, NMFS asked a U.S. canner voluntarily to provide documentation for randomly chosen can codes, all from cans labeled "dolphin safe." One can code was for tuna that was caught and processed in a foreign country, then canned in the United States. Two other can codes were for tuna that was canned in foreign countries for import to the United States. In all three cases, NMFS was able to trace the product in the can back through the processing system to the fishing vessel that harvested the tuna. In all cases, "dolphin safe" certification as

required by the company accompanied the shipment, and the "paper trail" leading to the source of the canned product was provided.

The FDA requirements and regulations already impose strict control on tracking of processed fish to its source. However, this rule provides the authority for the Assistant Administrator or any designated officer of the Secretary to request, at any time and in writing, any exporter, importer, processor, distributor or seller of any tuna product labeled as "dolphin safe" to produce, within a specified time period, documentary evidence concerning the origin of any such tuna product that is offered for sale or intended for export.

To ensure compliance with this rule, NMFS enforcement officers will conduct occasional, unscheduled spot checks at processing or distribution centers and at the time of export from the United States. These spot checks will require the processor or exporter to provide the documentation required by this rule for dolphin safe tuna to be sold or exported from the United States. If any violations are noted as a result of the spot checks, referrals will be made to NMFS, the U.S. Customs Service, the FTC and/or the FDA for possible enforcement action.

Any person who knowingly and willfully makes a statement or endorsement required by 50 CFR 247.4 that is false may be subject to a civil penalty of up to $100,000. The statements and endorsements required by section 247.4 are: The observer certification, the captain's certification, endorsements by all processors, endorsements by all importers, and endorsements by all exporters. Other U.S. laws and regulations also apply to the production, import, export, distribution, sale, and labeling of tuna or other fish products offered for sale in or exported from the United States. Such laws include, but are not limited to: the FTCA, the Pure Food and Drug Act, and U.S. Customs laws.

Large-scale Driftnet Nations

The Assistant Administrator has determined that large-scale driftnets are used on the high seas by vessels of: Korea, Japan, Taiwan (Republic of China), and France. In this rule these nations are referred to as "driftnet nations." This determination was made using information contained in diplomatic communications and in a "Report of the Workshop on Mortality of Cetaceans in Passive Fishing Nets and Traps" (in press) convened by the Scientific Committee of the International Whaling Commission at the Southwest Fisheries Science Center, NMFS, La Jolla, California, October 22–25, 1990. The workshop was a contribution to the United Nations deliberations on the impacts of driftnetting. In the future, if the Assistant Administrator determines that any other nation is a driftnet nation, such a determination shall be published in the **Federal Register.**

Driftnet nations may request a finding that its vessels no longer engage in large-scale driftnet fishing on the high seas. To initiate such a finding, a responsible government official of a driftnet nation must certify to NMFS that none of the nation's vessels engage in such fishing practices. Upon receipt of the certification, the Assistant Administrator may make a finding and publish the determination in the **Federal Register.**

New Requirements for Importation of Fish Products

In order to clarify the MMPA embargo on foreign fish products caught with technology resulting in an unacceptably high incidence of marine mammal deaths or injuries, the DPCIA requires that each driftnet nation certify that imported fish and fish products harvested by vessels of that nation or exported by that nation were not caught with large-scale driftnets on the high seas. Imported tuna and tuna products subject to this rule harvested after July 1, 1991, must be accompanied by documentation certifying the harvest was not conducted with large-scale driftnets anywhere on the high seas. For imported non-tuna fish or fish products subject to this rule harvested after July 1, 1991, the documentation must certify the harvest was not conducted using large-scale driftnets in the South Pacific Ocean. South Pacific Ocean is defined as that part of the Pacific Ocean south of the equator. For harvests after July 1, 1992, the distinction, for certification purposes, between tuna and non-tuna will be dropped, i.e., documents accompanying imported fish and fish products subject to this rule, including tuna, must show the harvest was not conducted with large-scale driftnets anywhere on the high seas.

The required certification may be accomplished by having a responsible government official of the harvesting nation sign the appropriate block on the Fisheries Certificate of Origin, or by providing a similar statement on a separate piece of paper, attached to a completed Certificate.

The submission of a Fisheries Certificate of Origin will be required at the time of importation for all HTS tuna items subject to this rule and for all HTS items subject to this rule other than tuna if harvested by or exported from a driftnet nation. This requirement means that Fisheries Certificate of Origin forms should be available for endorsement by exporters, importers, and processors within those nations who wish to enter their non-driftnet harvested fish and fish products into the United States without unnecessary detainment of their shipments.

A copy of the original invoice or other appropriate purchase documentation must also accompany all shipments of fish described by the Fisheries Certificate of Origin, or be available upon request by NMFS within 30 days of a request for the invoice. The purpose of this is to verify the accuracy of the information contained on the Fisheries Certificate of Origin and accompanying documentation.

Preparation and Background of this Rule

Significant effort was made by NMFS to gain a familiarity with regulations governing the importation, processing, and labeling of seafood as conducted by other agencies of the U.S. Government, and subsequently to develop a workable procedure for tracking tuna labeled "dolphin safe." This effort involved meetings with the Food and Drug Administration, the Federal Trade Commission, and the U.S. Customs Service. Following these meetings, a draft rule was prepared that outlined the procedures established in this interim final rule. The first draft was prepared at the end of February 1991 and supplied to all interested Federal agencies. After receiving and carefully considering comments from these agencies, a second draft was prepared and supplied to the major U.S. tuna canners, interested environmental groups (including the Dolphin Coalition, representing approximately nine environmental organizations), the Marine Mammal Commission, and the above-named Federal agencies.

A workshop to discuss the second draft was held in Silver Spring, Maryland, on March 26, 1991, which was attended by all of the recipients of the draft regulations and several other interested parties. At the workshop, a variety of oral and written comments were offered concerning the second draft. All comments were considered in preparing a third draft of the rule, which was again supplied to industry representatives, members of the environmental community, and other interested parties. Comments received on the third draft were considered, and several suggestions were incorporated into interim final rule. Therefore, appropriate steps to obtain the views of interested persons have been taken and

have been instrumental in formulating this regulation.

This rule implements the DPCIA, which became law on November 28, 1990. This law reflects the policy of the U.S. Government to ameliorate a world-wide environmental crisis in which marine mammals and other marine life are being killed each year by commercial fishing technology, such as large-scale driftnets and purse seine nets set on dolphin. The U.S. Congress considered this situation so urgent that it directed the Secretary of Commerce to issue these regulations not later than 6 months after enactment. To achieve the goals set by Congress, i.e., to eliminate as soon as practicable the incidental killing of dolphin and the wasteful taking of untargeted marine life, this rule is being issued as an interim final rule with a request for comments.

Classification

Because they involve a foreign affairs function of the U.S., the provisions in this rule revising 50 CFR 216.24 are not subject to the notice-and-comment requirements of the Administrative Procedure Act pursuant to section 553(a)(1) of that Act. The DPCIA and this rule are intended to implement United Nations General Assembly Resolution 44/225, which calls upon the world community to cease large-scale driftnet fishing in the South Pacific region by July 1, 1991, to cease expansion of large-scale driftnet fishing in the rest of the world immediately, and to cease large-scale driftnet fishing throughout the world by June 30, 1992. In furtherance of these goals, the United States recently prohibited the use of large-scale driftnet fishing by persons under U.S. jurisdiction (section 307(1)(M) of the Magnuson Fishery Conservation and Management Act, 16 U.S.C. 1857). The DPCIA restricts international commerce in large-scale driftnet products through U.S. ports. These restrictions, implemented by revisions to § 216.24, reflect the policy of the United States to discourage large-scale driftnet fishing by other nations.

The provisions of this rule that add a new part 247 to title 50 CFR, while not directly involving a foreign affairs function of the United States, are also being published as an interim final rule. NMFS has concluded that there is good cause to issue this entire rule as an interim final rule, because it would be impracticable and contrary to the public interest to allow additional time for advance notice and comment or a delayed effectiveness period, and also because NMFS has made considerable efforts to obtain and consider the views of interested parties. The intent of Congress is to facilitate the ability of consumers to limit the damage done to dolphin in the commercial tuna industry as soon as possible by indicating that regulations should be issued by May 27, 1991. Furthermore, a comment period is provided by this interim final rule. The efforts expended by NMFS in preparation of this rule and the intent of the DPCIA are discussed above, under "Preparation and Background of this Rule."

Comments on the interim regulations will be considered if received before January 1, 1992. The extended comment period will allow all interested parties to become acquainted with the requirements and procedures of the rule. If prior to the end of the comment period, NMFS is made aware of significant problems in the administration of the provisions of this rule, another interim final rule may be issued to address the problems, prior to issuance of a final rule.

Since notice and an opportunity for comment is not required by law to be given for this rule preparation of a regulatory flexibility analysis is not required by the Regulatory Flexibility Act and none was prepared.

This action is categorically excluded from the requirement to prepare an environmental assessment by section 5.c.(3) of NOAA Directive 02–10.

The Assistant Administrator has determined that this rule is not a "major" rule requiring a regulatory impact analysis under Executive Order 12291. The annual effect on the U.S. economy is expected to be substantially less than $100 million. No significant adverse impacts are anticipated on competition, employment, investments, productivity, innovation, or competitiveness of U.S.-based enterprises. Major processors and importers are expected to seek sources of tuna and other fish products that are not caught with large-scale driftnets and that are labeled in conformance with the requirements of this rule. Therefore, no loss of imports is expected. Furthermore, any new paperwork burden resulting from the requirement to submit the new Fisheries Certificate of Origin is partially offset by abolition of the Yellowfin Tuna Certificate of Origin. A Regulatory Impact Review was prepared by NMFS for this interim final rule, and is available on request (see **ADDRESSES**).

This rule contains collection-of-information requirements subject to the Paperwork Reduction Act. The collections, found at 50 CFR 216.24(e), have been submitted for approval by OMB under Control Number 0648–0040. The public reporting burden for this continuing collection of information is estimated to average 0.66 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Importers are required to present the information on NOAA Form 370, "Fisheries Certificate of Origin," at the time of entry. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden to: National Marine Fisheries Service (F/PR), 1335 East-West Highway, Silver Spring, MD 20910, and to the Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503 (Attn: Paperwork Reduction Act Project).

This rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

This rule does not directly affect the coastal zone of any state with an approved coastal management program.

List of Subjects in 50 CFR

Administrative practice and procedure, Imports, Marine mammals, Penalties, Reporting and recordkeeping requirements, Transportation.

Part 247

Exports, Fish, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements.

Dated: September 12, 1991.

Samuel W. McKeen,

Program Management Officer, National Marine Fisheries Service.

For reasons set forth in the preamble, chapter II of title 50, Code of Federal Regulations is amended as follows:

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

1. The authority citation for part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 *et. seq.*, unless otherwise noted.

2. Section 216.3 is amended by adding in alphabetical order definitions of "first exporter", "large-scale driftnet", and "South Pacific Ocean", in alphabetical order, to read as follows:

§ 216.3 Definitions.

* * * * *

First exporter means the person or company that first exports the fish or fish product, or, in the case of shipments that are subject to the labeling

requirements of 50 CFR part 247 and that only contain fish harvested by vessels of the United States, the first seller of the fish or fish product.

* * * * *

Large-scale driftnet means a gillnet that is composed of a panel or panels of webbing, or a series of such gillnets, with a total length of 2.5 kilometers or more that is used on the high seas and allowed to drift with the currents and winds for the purpose of harvesting fish by entangling the fish in the webbing of the net.

* * * * *

South Pacific Ocean means any waters of the Pacific Ocean that lie south of the equator.

* * * * *

3. Section 216.24 is amended by revising paragraphs (e)(2)(i), (e)(2)(ii), (e)(3), (e)(4), (e)(6), and (e)(8), and by adding a new paragraph (e)(2)(iii) to read as follows:

§ 216.24 Taking and related acts incidental to commercial fishing operations.

* * * * *

(e) * * *

(2) * * *

(i) *Tuna: yellowfin.* The following U.S. Harmonized Tariff Schedule Item Numbers identify the categories of yellowfin tuna and yellowfin tuna products that are harvested in the ETP purse seine fisher (some of which are also harvested with large-scale driftnet), are imported into the United States, and are subject to the restrictions of paragraphs (e)(3) and (e)(5) of this section:

(A) Tuna, frozen whole or in the round:

0303.40.00.40.6 Tuna, yellowfin, eviscerated head-on, frozen.
0303.42.00.20.0 Tuna, yellowfin, whole frozen.
0303.42.00.60.1 Tuna, yellowfin, eviscerated head-off, frozen.
0303.49.00.40.9 Tuna, non-specific, frozen.

(B) Tuna, canned:

1604.14.10.00.0 Tuna, non-specific, canned in oil.
1604.14.20.40.0 Tuna, non-specific, canned, not in oil, not over 7kg in quota.
1604.14.30.40.8 Tuna, non-specific, canned, not in oil, not over 7kg over quota.

(C) Tuna, loins:

1604.14.40.00.4 Tuna, non-specific, not in airtight container, not in oil, over 6.8kg.
1604.14.50.00.1 Tuna, non-specific, not in airtight container, not in oil, not over 6.8kg.

(ii) *Tuna: non-yellowfin.* The following U.S. Harmonized Tariff Schedule Item Numbers identify the categories of tuna and tuna products that are harvested with large-scale driftnet and imported into the United States and are subject to the restrictions of paragraph (e)(3) of this section:

(A) Tuna, frozen whole or in the round:

0303.41.00.00.5 Tuna, albacore, frozen.
0303.43.00.00.3 Tuna, skipjack, frozen.
0303.49.00.20.3 Tuna, bluefin, frozen.

(B) Tuna, canned:

1604.14.20.20.4 Tuna, albacore, canned, not in oil, not over 7kg in quota.
1604.14.30.20.2 Tuna, albacore, canned, not in oil, not over 7kg over quota.

(iii) *Fish, other than tuna.* The following U.S. Harmonized Tariff Schedule Item Numbers identify the categories of fish and fish products that are imported into the United States and are subject to the restrictions of paragraph (e)(3) of this section:

(A) Salmon:

(*1*) Salmon, frozen whole or in the round:

0303.10.00.12.8 Salmon, chinook, frozen.
0303.10.00.22.6 Salmon, chum, frozen.
0303.10.00.32.4 Salmon, pink, frozen.
0303.10.00.42.2 Salmon, sockeye, frozen.
0303.10.00.52.9 Salmon, coho, frozen.
0303.10.00.62.7 Salmon, Pacific, non-specific, frozen.
0303.21.00.00.9 Trout, frozen.
0303.22.00.00.8 Salmon, Atlantic, Danube, frozen.
0303.29.00.00.1 Salmonidae, non-specific, frozen.
0304.20.60.07.9 Salmonidae, salmon fillet, frozen.
0305.69.40.00.2 Salmon, non-specific, salted.

(*2*) Salmon, canned:

1604.11.20.20.7 Salmon, pink, canned in oil.
1604.11.20.30.5 Salmon, sockeye, canned in oil.
1604.11.20.90.2 Salmon, non-specific, canned in oil.
1604.11.40.10.5 Salmon, chum, canned, not in oil.
1604.11.40.20.3 Salmon, pink, canned, not in oil.
1604.11.40.30.1 Salmon, sockeye, canned, not in oil.
1604.11.40.40.9 Salmon, non-specific, canned, not in oil.
1604.11.40.50.6 Salmon, non-specific, other.

(B) Squid:

0307.49.00.10.1 Squid, non-specific, fillet, frozen.
0307.49.00.50.2 Squid, non-specific, frozen/dried/salted/brine.
0307.49.00.60.0 Squid, non-specific, & cuttlefish frozen/dried/salted/brine.
1605.90.60.55.9 Squid, non-specific, prepared/preserved.

(C) Shark:

0303.75.00.00.4 Shark, dogfish and other sharks, frozen.
0305.59.20.00.8 Shark fins.

(D) Swordfish:

0303.79.20.40.8 Swordfish, frozen.

(E) Species not specifically identified:

0303.79.40.90.3 Marine fish, non-specific, frozen.
0304.20.20.66.6 Marine fish, non-specific, fillet blocks frozen over 4.5kg.
0304.20.60.85.4 Marine fish, non-specific, fillet, frozen.
0305.30.60.80.6 Fish, non-specific, fillet dried/salted/brine over 6.8kg.
0305.49.40.40.9 Fish, non-specific, smoked.
0305.59.40.00.4 Fish, non-specific, dried.
0305.69.50.00.9 Fish, non-specific, salted, not over 6.8kg.
0305.69.60.00.7 Fish, non-specific, salted, over 6.8kg.
1604.19.20.00.3 Fish, non-specific, in airtight containers, not in oil.
1604.19.30.00.1 Fish, non-specific, in airtight containers, in oil.

(3)(i) *Tuna*—(A) *All nations.* No shipment containing an item listed in paragraph (e)(2)(i) or (e)(2)(ii) of this section, from any nation, may be imported into the United States unless:

(*1*) Accompanied by a completed Fisheries Certificate of Origin described in paragraph (e)(3)(iii) of this section;

(*2*) The tuna or tuna product was not harvested with a large-scale driftnet after July 1, 1991; and

(*3*) An original invoice accompanies the shipment at the time of importation, or is made available within 30 days of a request by the Secretary to produce the invoice.

(B) *Harvesting nations.* No shipment containing an item listed in paragraph (e)(2)(i) of this section may be imported into the United States from a harvesting nation subject to paragraph (e)(5)(i) of this section unless a finding required for importation has been made.

(C) *Intermediary nations.* No shipment containing an item listed in paragraph (e)(2)(i) of this section may be imported into the United States from an intermediary nation subject to paragraph (e)(5)(ix) of this section if an embargo or ban has been imposed prohibiting the importation.

(D) *Harvesting and intermediary nations.* No shipment containing an item listed in paragraph (e)(2)(i) of this section may be imported into the United States from a nation that is both a harvesting nation subject to paragraph (e)(5)(i) of this section and an intermediary nation subject to paragraph (e)(5)(ix) of this section unless the necessary finding has been made and an embargo or ban has not been imposed.

(ii) *Other fish.* After July 1, 1991, no shipment containing an item listed in paragraphs (e)(2)(iii)(B) through (E) of this section, and, after July 1, 1992, no shipment containing an item in the whole of paragraph (e)(2)(iii) of this section, that was harvested by any

nation determined by the Assistant Administrator to be engaged in large-scale driftnet fishing, or exported from any such nation, either directly or through an intermediary nation, may be imported into the United States unless:

(A) Accompanied by a complete Fisheries Certificate of Origin, as described in paragraph (e)(3)(iii) of this section;

(B) The fish or fish product was not harvested with a large-scale driftnet, if the area of harvest, as described on the Fisheries Certificate of Origin was:

(*1*) The South Pacific Ocean, for harvests after July 1, 1991; or

(*2*) Anywhere on the high seas, for harvests after July 1, 1992; and

(C) An original invoice accompanies the shipment at the time of importation, or is made available within 30 days of a request by the Secretary to produce the invoice.

(iii) *Certificates of Origin.* A Fisheries Certificate of Origin (NOAA Form 370), [1] certified to be accurate by the first exporter of the accompanying shipment, must include the following information:

(A) Country under whose laws the harvesting vessel operated;

(B) Exporter (name and address);

(C) Consignee (name and address);

(D) Type and quantity of the fish or fish products to be imported, listed by U.S. Harmonized Tariff Schedule Number;

(E) Ocean area where the fish was harvested (ETP, Western Pacific Ocean, South Pacific Ocean, Atlantic Ocean, Caribbean Sea, Indian Ocean, or other);

(F) Type of fishing gear used to harvest the fish (purse seine, longline, bait boat, large-scale driftnet, other type of gillnet, trawl, pole and line, other);

(G) Dates on which the fishing trip began and ended;

(H) If shipment is tuna or products from tuna that were harvested in the ETP with a purse seine net, the name of the harvesting vessel; and

(I) For shipments harvested by vessels of a nation known to use large-scale driftnets, as determined by the Secretary pursuant to paragraph (e)(4) of this section, a statement must be included on the Fisheries Certificate of Origin, or by separate attachment, that is dated and signed by a responsible government official of the harvesting nation, certifying that the fish or fish product was harvested by a method other than large-scale driftnet, if the shipment includes:

[1] Copies of the form are available from Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, CA 90731.

(*1*) Tuna or tuna products described in paragraph (e)(2) (i) or (ii) of this section that were harvested on the high seas after July 1, 1991; or

(*2*) Fish or fish products other than tuna described in paragraph (e)(2)(iii) of this section that were harvested in the South Pacific Ocean after July 1, 1991, or that were harvested anywhere on the high seas after July 1, 1992.

(4) *Large-scale driftnet nations.* Based upon the best information available, the Assistant Administrator will determine which nations have registered vessels that engage in fishing with large-scale driftnets. Such determinations shall be published in the **Federal Register.** A responsible government official of any such nation may certify to the Assistant Administrator that none of the nation's vessels use large-scale driftnets. Upon receipt of the certification, the Assistant Administrator may find, and publish such finding in the **Federal Register**, that none of the nation's vessels engage in fishing with large-scale driftnets.

* * * * *

(6) *Fish refused entry.* If fish is denied entry under the provisions of § 216.24(e)(3), the District Director of Customs shall refuse to release the fish for entry into the United States and shall issue a notice of such refusal to the importer or consignee.

* * * * *

(8) *Disposition of fish refused entry into the United States; redelivered fish.* Fish which is denied entry under § 216.24(e)(3) or which is delivered in accordance with § 216.24(e)(7) and which is not exported under Customs supervision within 90 days from the date of notice of refusal of admission or date of redelivery shall be disposed of under Customs laws and regulations. *Provided however,* That any disposition shall not result in an introduction into the United States of fish caught in violation of the Marine Mammal Protection Act of 1972.

* * * * *

4. The title of subchapter E is revised to read as follows:

SUBCHAPTER E—TRANSPORTATION AND LABELING OF FISH OR WILDLIFE

5. Subchapter E is amended by adding a new part 247 to read as follows:

PART 247—DOLPHIN SAFE TUNA LABELING

Sec.

Authority. 16 U.S.C. 1385.

§ 247.1 Purpose.

This part governs the requirements for labeling of tuna or tuna products sold in or exported from the United States that suggest the tuna was harvested in a manner not injurious to dolphins.

§ 247.2 Definitions.

Assistant Administrator means the Assistant Administrator for Fisheries, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce, or the Assistant Administrator's designee.

ETP means the eastern tropical Pacific Ocean, which includes the Pacific Ocean area bounded by 40° N. latitude, 40° S. latitude, 160° W. longitude and the coastline of North, Central, and South America.

Fisheries Certification of Origin means NOAA Form 370, as described in 50 CFR 216.24(e)(3)(iii).

Label means a display of written, printed, or graphic matter on or affixed to the immediate container of any article.

Large-scale driftnet means a gillnet that is composed of a panel or panels of webbing, or a series of such gillnets, with a total length of 2.5 kilometers or more that is used on the high seas and allowed to drift with the currents and winds for the purpose of harvesting fish by entangling the fish in the webbing of the net.

Secretary means the Secretary of Commerce, or the Secretary's designee.

Tuna product means any food product processed for retail sale and intended for human or animal consumption that contains an item listed in 50 CFR 216.24(e)(2) (i) or (ii), but does not include perishable items with a shelf life of less than 3 days.

§ 247.3 Labeling requirements.

It is a violation of section 5 of the Federal Trade Commission Act (15 U.S.C. 45) for any person subject to U.S. jurisdiction, including any producer, exporter, importer, distributor, or seller of any tuna product exported from the United States or offered for sale in the United States to include on the label of that product the term "dolphin safe" or any other term, phrase, or symbol that claims or suggests that the tuna contained in the product was harvested using a fishing method that is not harmful to dolphins, if the product:

(a) Contains tuna harvested with a large-scale driftnet; or

(b) Contains tuna harvested in the ETP by a purse seine vessel 400 short

tons (362.9 metric tons) carrying capacity or greater and is labeled in a manner that violates the standards set forth in §§ 247.4 or 247.5.

§ 247.4 Purse seine vessels greater than 400 tons.

For purposes of § 247.3(b), any tuna product containing tuna that were harvested in the ETP by a purse seine vessel 400 short tons (362.9 metric tons) carrying capacity or greater, must be accompanied by:

(a) A completed Fisheries Certificate of Origin;

(b) A written statement by the captain of each vessel that harvested the tuna, certifying that the vessel did not intentionally deploy a purse seine net on or to encircle dolphins at any time during the trip;

(c) A written statement certifying that an observer, employed by or working under contract with the Inter-American Tropical Tuna Commission or the Secretary, was on board the vessel during the entire trip and that the vessel did not intentionally deploy a purse seine net on or to encircle dolphin at any time during the trip. The statement must be signed by either:

(1) The Secretary; or

(2) A representative of the Inter-American Tropical Tuna Commission; and

(d) An endorsement on the Fisheries Certificate of Origin by each exporter, importer, and processor certifying that, to the best of his or her knowledge and belief, the Fisheries Certificate of Origin and attached documentation, and the statements required by paragraphs (b) and (c) of this section accurately describe the tuna products.

§ 247.5 Submission of documentation.

The documents required by § 247.4 must accompany the tuna product whenever it is offered for sale or export, except that these documents need not accompany the product when offered for sale if:

(a) The documents do not require further endorsement by any importer or processor, and are submitted to officials of the U.S. Customs Service at the time of importation; or

(b) The documents are endorsed as required by § 247.4(d), and delivered to the Director, Southwest Region, National Marine Fisheries Service, 300 South Ferry Street, Terminal Island, CA 90731, or to the U.S. Customs Service at the time of exportation.

§ 247.6 Requests to review documents.

At any time, the Assistant Administrator may request, in writing, any exporter, importer, processor, distributor, or seller of any tuna or tuna product labeled in a manner subject to the requirements of § 247.3, to produce, within a specified time period, all documentary evidence concerning the origin of any product that is offered as "dolphin safe," including the original invoice.

§ 247.7 False statements or endorsements.

Any person who knowingly and willfully makes a false statement or false endorsement required by § 247.4, is liable for a civil penalty not to exceed $100,000, that may be assessed in an action brought in any appropriate District Court of the United States on behalf of the Secretary.

[FR Doc. 91-22468 Filed 9-18-91; 8:45 am]

BILLING CODE 3510-22-M

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50 CFR Parts 672 and 675

[Docket No. 910643-1143]

Groundfish of the Gulf of Alaska; Groundfish of the Bering Sea and Aleutian Islands Area

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Emergency rule; extension of effectiveness.

SUMMARY: An emergency rule that establishes certain groundfish fishery restrictions in the Gulf of Alaska (GOA) and Bering Sea and Aleutian Islands (BSAI) areas to minimize the possible adverse effects of the pollock fishery on Steller sea lions is in effect through September 17, 1991. The Secretary of Commerce (Secretary), with the agreement of the North Pacific Fishery Management Council (Council), extends the emergency rule for an additional 90 days (through December 16, 1991). The intended effect of this rule is to respond to an emergency to continue to ensure that pollock fishing does not jeopardize the continued existence or recovery of the threatened Steller sea lion.

EFFECTIVE DATES: The amendments to parts 672 and 675 published on June 19, 1991 at 56 FR 28116 are extended from September 18, 1991, through December 16, 1991.

ADDRESSES: Copies of documents supporting this action may be obtained from Dale R. Evans, Chief, Fisheries Management Division, Alaska Region, National Marine Fisheries Service, P.O. Box 21668, Juneau, Alaska 99802. Comments should be sent to the same address.

FOR FURTHER INFORMATION CONTACT: Raymond E. Baglin (Fisheries Management Division, NMFS), 907-586-7228.

SUPPLEMENTARY INFORMATION: The groundfish fisheries in the exclusive economic zone (EEZ) of the GOA and BSAI are managed by the Secretary under the Fishery Management Plans (FMPs) for Groundfish of the Gulf of Alaska and for the Groundfish Fishery of the Bering Sea and Aleutian Islands Area. These FMPs were prepared by the Council under the Magnuson Fishery Conservation and Management Act (Magnuson Act). The FMPs are implemented by regulations for the foreign fishery at 50 CFR 611.92 and 611.93 and for the U.S. fishery at 50 CFR parts 672 and 675. General regulations that also pertain to the U.S. fisheries appear at 50 CFR part 620.

Under section 305(c) of the Magnuson Act, the Secretary promulgated an emergency rule (56 FR 28112; June 19, 1991) effective for 90 days (June 13, 1991 through September 17, 1991) to minimize the possible adverse effects of the pollock fishery on Steller sea lions. The Secretary is extending the emergency rule for an additional 90 days in accordance with section 305(c) of the Magnuson Act because the conditions identifying the emergency action remain unchanged.

Details concerning the basis for the emergency rule and the classification of the rulemaking are contained in the initial emergency rule and are not repeated here.

Other Matters

This extension of the emergency rule is exempt from the normal review procedures of E.O. 12291 as provided for in section 8(a)(1) of that order. It is being reported to the Director, Office of Management and Budget, with an explanation of why it is not possible to follow the procedures of that order.

List of Subjects in 50 CFR Parts 672 and 675

Fisheries, Fishing, Reporting, and recordkeeping requirements.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 13, 1991.

Samuel W. McKeen,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

[FR Doc. 91-22615 Filed 9-16-91; 2:18 pm]

BILLING CODE 3510-22-M

Proposed Rules

Federal Register
Vol. 56, No. 182
Thursday, September 19, 1991

RAILROAD RETIREMENT BOARD

20 CFR Part 255

RIN 3220-AA44

Recovery of Overpayments

AGENCY: Railroad Retirement Board.

ACTION: Proposed rule.

SUMMARY: The Railroad Retirement Board (Board) proposes to revise part 255 of its regulations, currently entitled "Recovery of Erroneous Payments", to incorporate internal procedures with respect to individuals from whom and under what circumstances a recovery of an overpayment of benefits will be made, the circumstances under which such recovery may be waived, and the circumstances under which such recovery may be terminated or suspended under the Board's authority concerning administrative relief from recovery. The Board also proposes to revise part 255 to add new restrictions on waiver, thus, making it easier for the Board to recover certain types of overpayments.

DATES: Comments must be received by October 21, 1991.

ADDRESSES: Secretary to the Board, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

FOR FURTHER INFORMATION CONTACT: Thomas W. Sadler, General Attorney, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611, (312) 751-4513 (FTS 386-4513).

SUPPLEMENTARY INFORMATION: Part 255 of the Board's regulations has not been revised since 1967. Although section 10 of the Railroad Retirement Act of 1974 (45 U.S.C. 231i) includes provisions for recovery and waiver of overpayments of benefits which are substantially the same provisions included in the Railroad Retirement Act of 1937 (45 U.S.C. 228i, superseded), internal procedures dealing with overpayments of benefits have been developed which should properly be included in the regulations of the Board. In addition, in the Board's view, waiver should not be available with respect to certain types of overpayments and this proposed rule reflects those policy decisions. Because the proposed rule makes extensive changes in the existing regulation, a section-by-section analysis is provided below.

The title of part 255 is proposed to be revised to "Recovery of Overpayments." The present title, "Recover of Erroneous Payments," mistakenly implies that all such payments were caused by "fault". Overpayments can and do occur through no fault of the recipients of such payments. The purposes of part 255 is to set out regulations to govern those instances where more than the correct amount of benefits has been made, regardless of whether or not "fault" exists. (The term "erroneous payment" also appears in other parts of this chapter. As these parts are revised this term will be replaced with the term "overpayment" to conform to this part.)

The proposed § 255.1 replaces the present § 255.1, which sets out statutory provisions, with an introductory statement which summarizes what is included in part 255.

The proposed § 255.2 defines "overpayment" using essentially the same language that the present § 255.2 uses to define "erroneous payments."

The proposed § 255.3 states the general rule that overpayments shall be recovered in all cases except where recovery is waived under § 255.10 or administrative relief from recovery is granted under § 255.17 or where collection is suspended or terminated under these regulations or the Federal Claims Collection Standards.

The proposed § 255.4 replaces the present § 255.4, which simply states in a summary manner the methods by which erroneous payments may be recovered, with a detailed description of those individuals from whom overpayments may be recovered.

The proposed §§ 255.5–255.8 set out the methods by which an overpayment of benefits may be recovered. These methods include recovery by cash payment (§ 255.5), recovery by setoff from any subsequent payment determined to be payable on the basis of the same record of compensation (§ 255.6), recovery by deduction in the computation of a residual lump-sum death benefit payable under the Railroad Retirement Act (§ 255.7), and recovery by actuarial adjustment of an annuity (§ 255.8). These proposed sections are substantially similar to the present §§ 255.5–255.8. However, proposed § 255.8, unlike the present section, provides that an actuarial adjustment is not effective until the overpaid annuitant negotiates the first check which reflects the actuarially adjusted rate.

The proposed § 255.9 provides that where recovery of an overpayment is by setoff which can be effected within 5 months and the individual from whom recovery is sought is an enrollee under Part B of Medicare, the individual's monthly Medicare premium will be paid and the balance of the annuity amount will be applied toward recovery of the overpayment. The proposed section is new and is intended to save the agency the administrative costs of billing an annuitant for his or her Part B Medicare premium where his or her annuity would be offset in its entirety to recover an overpayment and to avoid lapse of Medicare coverage.

The proposed § 255.10 sets out the general requirements for waiver of recovery of an overpayment and is similar to the present § 255.10.

The present § 255.11 is proposed to be removed because it is redundant.

The proposed § 255.11 defines "fault" and gives examples of when an individual is or is not at fault based upon past agency decisions. The proposed § 255.12 defines when recovery is contrary to the purpose of the Railroad Retirement Act, based upon past agency decisions. The proposed § 255.13 defines when recovery is against equity or good conscience. Each of these proposed sections is new and together they expand on the present § 255.12.

The proposed §§ 255.14 and 255.15 are new sections which describe special situations where waiver of recovery of an overpayment is not available. Specifically, § 255.14 provides that waiver is not available when recovery can be made from an accrual of social security benefits. Section 255.15 provides that waiver is not generally available to the estate of an individual.

The proposed § 255.16 sets out internal Board policy governing those situations where recovery of an overpayment may not be waived under section 10(c) of the Railroad Retirement Act, thus extinguishing the debt, but

where recovery will not be sought for equitable reasons. The present regulations do not contain such a provision.

Proposed § 255.17 is a new section and explains how an overpayment is recovered when that overpayment was made to a representative payee under part 266 of this chapter.

Proposed §§ 255.18 and 255.19, which deal with compromise, suspension or termination of the collection of overpayments are identical to the present §§ 255.14 and 255.15 with the exception that references to the Federal Claims Standards (4 CFR chapter 2) have been added.

The agency has determined that this is not a major rule for purposes of Executive Order 12291; therefore, no regulatory impact analysis is required. The provisions of the Paperwork Reduction Act of 1980 (44 U.S.C. ch. 35) do not apply.

List of Subjects in 20 CFR Part 255

Railroad employees, Railroad retirement.

1. For the reasons set out in the preamble, title 20, chapter II, part 255 of the Code of Federal Regulations is proposed to be revised as follows:

PART 255—RECOVERY OF OVERPAYMENTS

Sec.

Authority: 45 U.S.C. 231f(b)(5); 45 U.S.C. 231i.

§ 255.1 Introduction.

Section 10 of the Railroad Retirement Act provides for the recovery of an overpayment of benefits to an individual. This part explains when an overpayment must be recovered, from whom an overpayment may be recovered, and when recovery of the overpayment may be waived or administrative relief from recovery granted, and circumstances under which the overpayment may be compromised, or circumstances under which recovery of the overpayment may be suspended or terminated.

§ 255.2 Overpayments.

An overpayment, within the meaning of this part, is made in any case in which an individual receives a payment under this chapter, all or part of which payment he or she is not entitled to receive.

§ 255.3 When overpayments are to be recovered.

Overpayments shall be recovered in all cases except those in which recovery is waived under § 255.10 of this part or administrative relief from recovery is granted under § 255.16 of this part, or where the overpayment is compromised or recovery is terminated or suspended under §§ 255.18 or 255.19.

§ 255.4 Persons from whom overpayments may be recovered.

(a) *Overpaid individual.* The Board may recover an overpayment from the individual to whom the overpayment has been made by any method permitted by this part, or by the Federal Claims Collection Standards (4 CFR chapter 2) (example 1). If the overpaid individual dies before recovery is completed, then recovery may be effected by recovery from the estate or the heirs of such individual.

(b) *Other than overpaid individual.* The Board may recover an overpayment from a person other than the overpaid individual if such person is receiving benefits under a statute administered by the Board based upon the same record of compensation as the overpaid individual. In such a case, the Board will ordinarily recover the overpayment by setoff against such benefits as are provided for in § 255.6 of this part (example 2). However, the Board may ask for a cash refund of the overpayment.

(c) *Individual not in the same household.* Recovery under paragraph (b) of this section may be made from an individual who was not living in the same household, as defined in part 216 of this chapter, as the overpaid individual at the time of the overpayment, if the individual from whom recovery is to be made either was aware that benefits were being paid incorrectly or benefited from the overpayment (example 3).

(d) *Examples.* This section may be illustrated by the following examples:

Example (1). An employee receiving a disability annuity returns to work without notifying the Board. The Board discovers that the employee is working and determines that the employee has recovered from his disability and has been overpaid. The Board requests that the employee repay the overpayment by cash refund either in one lump sum or in installment payments. If the employee refuses, the Board may refer the debt to a collection agency or the Department of Justice for civil suit or may collect the debt in any other manner permitted by law.

Example (2). The employee in Example 1 agrees to refund the overpayment by cash installment payments. However, the employee dies before repaying the total amount of the overpayment. At his death the employee's widow, who was living with the employee at the time the overpayment was incurred, becomes entitled to a widow's annuity. The Board may recover the remainder of the overpayment from any benefits due the widow.

Example (3). C, a child of a deceased employee by the first marriage is receiving a disability annuity on the employee's record of compensation. W, the employee's second wife, is receiving a widow's annuity on the employee's record of compensation. C lives with his mother, the employee's first wife. C marries without notifying the Board. Marriage terminates a child's annuity. W is not aware of C's marriage. Upon discovery of C's marriage, the Board demands that C refund the overpaid annuities; C refuses. Even though W is receiving an annuity based upon the same record of compensation as that of C, the Board will not recover the overpayment from W because she is not in the same household as C, was not aware of the incorrect benefits paid and did not benefit from them.

§ 255.5 Recovery by cash payment.

The Board shall have the right to require that an overpayment to an individual be immediately and fully repaid in cash by that individual. However, if the individual is financially unable to pay the amount of the indebtedness in a lump sum, payment may be accepted in regular installments in accordance with the Federal Claims Collection Standards, found in 4 CFR chapter 2. These standards provide that whenever possible installment payments should be sufficient in amounts and frequency to liquidate the debt in not more than 3 years.

§ 255.6 Recovery by setoff.

An overpayment may be recovered by setoff from any subsequent payment determined to be payable under any

statute administered by the Board to the individual who received the overpayment. An overpayment may be recovered from someone other than the overpaid individual by setoff from a subsequent payment determined to be payable to that other individual on the basis of the same record of compensation as that of the overpaid individual.

§ 255.7 Recovery by deduction in computation of death benefit.

In computing the residual lump sum provided for in part 234, subpart D, of this chapter, the Board shall include in the benefits to be deducted from the applicable percentages of the aggregate compensation provided for in that part all overpayments, whether waived under § 255.10 of this part or otherwise not recovered, that were paid to the employee or to his or her spouse or to his or her survivors with respect to the employee's employment.

§ 255.8 Recovery by adjustment in connection with subsequent payments.

Recovery of an overpayment may be made by permanently reducing the amount of any annuity payable to the individual or individuals from whom recovery is sought. This method of recovery is called an actuarial adjustment of the annuity. The Board cannot require any individual to take an actuarial adjustment in order to recover an overpayment nor is an actuarial adjustment available as a matter of right. An actuarial adjustment does not become effective until the overpaid individual negotiates the first annuity check which reflects the annuity rate after actuarial adjustment. *Example.* An annuitant agrees to recovery of a $5,000 overpayment made to him by actuarial adjustment. However, he dies before negotiating the first annuity check reflecting his actuarially reduced rate. The $5,000 is not considered recovered. If the annuitant had negotiated the check before he died, the $5,000 would be considered fully recovered.

§ 255.9 Individual enrolled under supplementary insurance plan.

Where recovery of the overpayment is by setoff as provided for in § 255.6 of this part, and where recovery of the overpayment by such means will be accomplished within a period of 5 months, and the individual from whom recovery is sought is an enrollee under part B of title XVIII of the Social Security Act (Supplementary Medical Insurance Benefits for the Aged and Disabled), an amount of such individual's monthly benefit which is equal to his or her obligation for supplementary medical insurance premiums will be applied toward payment of such premiums, and the balance of the monthly benefit will be applied toward recovery of the overpayment.

§ 255.10 Waiver of recovery.

There shall be no recovery from any person in any case where more than the correct amount of annuities or other benefits has been paid to an individual or where payment has been made to an individual not entitled thereto if in the judgment of the Board:

(a) The overpaid individual is without fault, and

(b) Recovery would be contrary to the purpose of the Railroad Retirement Act or would be against equity or good conscience.

§ 255.11 Fault.

(a) Before recovery of an overpayment may be waived, it must be determined that the overpaid individual was without fault in causing the overpayment. If recovery is sought from other than the overpaid individual but the overpaid individual was not without fault, then waiver is not available. However, see § 255.16 of this part for provisions as to when administrative relief from recovery may be granted in such circumstances.

(b) Fault means a defect of judgment or conduct arising from inattention or bad faith. Judgment or conduct is defective when it deviates from a standard of reasonable care taken to comply with the entitlement provisions of this chapter. Conduct includes both action and inaction. Unlike fraud, fault does not require a deliberate intent to deceive.

(c) Whether an individual is at fault in causing an overpayment generally depends on all circumstances surrounding the overpayment. Among the factors the Board will consider are: the ability of the overpaid individual to understand the reporting requirements of the Railroad Retirement Act or to realize that he or she is being overpaid (*e.g.*, age, education, comprehension, physical and mental condition); the particular cause of non-entitlement to benefits; and the number of instances in which the individual may have made erroneous statements.

(d) Circumstances in which the Board will find an individual at fault include but are not limited to:

(1) Failure to furnish information which the individual knew or should have known was material;

(2) An incorrect statement made by the individual which he or she knew or should have known was incorrect (including furnishing an opinion or conclusion when asked for facts); and

(3) Failure to return a payment which the individual knew or should have known was incorrect.

(e) Circumstances in which the Board will find an individual not at fault include but are not limited to:

(1) The overpayment is the result of the payment of an incorrect annuity rate to an individual for a period of more than 5 months after the Board receives information which should have caused a reduction in the amount of the benefit provided that the continued issuance of the payments at the incorrect rate led the beneficiary to believe in good faith that he or she was entitled to the amount represented by the payment. The individual shall be considered not at fault only with respect to the overpayments which accrue after the end of the five month period. This provision shall not be construed to preclude the recovery of overpayments due to non-entitlement.

(2) The overpayment is the result of Board error of which the overpaid individual could not reasonably be expected to be aware (Example 1).

(3) The overpayment is the result of an adjustment to the overpaid individual's annuity because of the entitlement of another individual to an annuity on the same record of compensation as that of the overpaid individual (Example 2).

(f) The application of this section may be illustrated by the following examples:

Example (1). The Board makes a mathematical error in the computation of an employee's annuity, thus giving the employee a higher rate than he or she is entitled to but which is sufficiently close to the estimated rate given the employee at the time he or she applied for the annuity that the employee believed, in good faith, that the amount was correct. The employee is not at fault in causing the overpayment in this case. The overpayment may be waived if the requirements of § 255.12 or § 255.13 of this part are met.

Example (2). The widow and four minor children of a railroad employee are receiving benefits from the Board under the family maximum. Another minor child not living in the same household as the above individuals is also determined to be the child of the deceased employee. The widow was not aware of the existence of this child. An award of benefits to this child causes a reduction in benefits to the other individuals under the family maximum benefit provision of the Social Security Act. Because of normal administrative delay this reduction does not take place for a period of 2 months after its effective date. The widow and her children are without fault with respect to this overpayment. The overpayment may be waived if the requirements of § 255.12 or § 255.13 of this part are met.

§ 255.12 When recovery is contrary to the purpose of the Railroad Retirement Act.

(a) The purpose of the Railroad Retirement Act is to pay retirement and survivor annuities and other benefits to eligible beneficiaries. It is contrary to the purpose of the Act for an overpayment to be recovered from income and resources which the individual requires to meet ordinary and necessary living expenses. If either income or resources, or a combination thereof, are sufficient to meet such expenses, recovery of an overpayment is not contrary to the purpose of the Act.

(b) For purpose of this section, income includes any funds which may reasonably be considered available for the individual's use, regardless of source. Income to the individual's spouse or dependents is available to the individual if the spouse or dependent lived with the individual at the time waiver is considered. Types of income include but are not limited to:

(1) Government benefits, such as Black Lung, Social Security, Workers' Compensation, and Unemployment Compensation benefits;

(2) Wages and self-employment income;

(3) Regular incoming payments, such as rent or pensions; and

(4) Investment income.

(c) For purposes of this section, resources may include:

(1) Liquid assets, such as cash on hand, the value of stocks, bonds, savings accounts, mutual funds and the like, and

(2) Non-liquid assets at their fair market value.

(3) Accumulated, unpaid Federal benefits.

(d) Whether an individual has sufficient income and resources to meet ordinary and necessary living expenses depends not only on the amount of his or her income and resources, but also on whether the expenses are ordinary and necessary. While the level of expenses which is ordinary and necessary may vary among individuals, it must be held at a level reasonable for an individual who is living on a fixed income. The Board will consider the discretionary nature of an expense in determining whether it is reasonable. Ordinary and necessary living expenses include:

(1) Fixed living expenses such as food and clothing, rent, mortgage payments, utilities, maintenance, insurance (*e.g.*, life, accident, and health insurance), taxes, installment payments, etc.;

(2) Medical, hospital, and other similar expenses;

(3) Expenses for the support of others for whom the individual is legally responsible; and

(4) Miscellaneous expenses (*e.g.*, newspapers, haircuts).

(e) Where recovery of the full amount of an overpayment would be made from income and resources required to meet ordinary and necessary living expenses, but recovery of a lesser amount would leave income or resources sufficient to meet such expenses, recovery of the lesser amount is not contrary to the purpose of the Act.

§ 255.13 When recovery is against equity or good conscience.

(a) Recovery is considered to be against equity or good conscience in either of the following circumstances:

(1) A person, in reliance on payments made to him or her or on notice that payment would be made, relinquished a valuable right (Example 1) or changed his or her position to his or her substantial detriment (Example 2).

(2) The overpayment was the result of Board error which the overpaid person could not reasonably be expected to be aware of and such error has gone undetected for a significant period of time. A period of 4 or more years shall be presumed to be significant. For purposes of this paragraph, the 4 year period begins when the Board first learns of the error.

(b) An individual's financial circumstances are not material to a finding that recovery of an overpayment would be against equity or good conscience.

(c) The section may be illustrated by the following examples:

Example (1). After being informed by the Board that he had been credited with sufficient years of railroad service to retire at age 60, an employee quit his railroad job and applied for benefits under the Railroad Retirement Act. He receives benefits for six months when it is discovered that he had insufficient railroad service to retire at age 60 and was not entitled to the benefits he received. His annuity was terminated. Because the employee gave up his seniority rights when he quit his railroad job, he cannot get his job back. It is determined that the employee was not at fault in causing the overpayments. In this situation recovery of the overpayment would be against equity or good conscience because the overpaid individual gave up a valuable right.

Example (2). A widow, having been awarded annuities for herself and her daughter, entered her daughter in a private school. In order to pay for the schooling she took out a loan and used the monthly annuities to pay interest and principal on the loan. After the widow and her daughter had received payments for almost a year, the deceased employee was found not to have been insured under the Railroad Retirement Act. Therefore, all payments to the widow and child were erroneous and the annuities were terminated. It is determined that the widow was not at fault in causing the overpayment. Having incurred a financial obligation (the school loan) toward which the benefits had been applied, the widow was in a worse position financially than if she and her daughter had never been entitled to benefits. In this situation, the recovery of the overpayment would be against equity or good conscience.

§ 255.14 Waiver not available when recovery can be made from accrual of social security benefits.

Where the overpayment is the result of a reduction of benefits payable under the Railroad Retirement Act due to the overpaid individual's entitlement to social security benefits and recovery of such overpayment may be made by offset against an accrual of social security benefits, it shall not be considered to be against equity or good conscience or contrary to the purpose of the Railroad Retirement Act to recover the overpayment by offset against the accrual. Consequently, in such a case recovery of an overpayment is not subject to waiver consideration.

§ 255.15 Waiver not available to an estate.

There shall be no waiver when recovery is sought from the estate of an overpaid individual except where the overpaid individual was not at fault in causing the overpayment and where recovery of the overpayment would have been waived under § 255.13 of this part had the individual not died.

§ 255.16 Administrative relief from recovery.

(a) Where the Board seeks to recover an overpayment from someone other than the overpaid individual, as provided for in § 255.4 of this part, and where waiver of recovery, as provided for in § 255.10 of this part, is not available because the overpaid individual was at fault as defined in § 255.11 of this part, the Board may forego recovery of the overpayment where the individual from whom recovery is sought was not at fault in causing the overpayment and has not received any benefit from the overpayment and where recovery is contrary to the purpose of the Railroad Retirement Act as defined in § 255.12 of this part.

(b) Application of administrative relief from recovery with respect to a given person from whom recovery may be made shall have no effect on the authority of the Board to recover the overpayment from anyone else from whom recovery may be sought.

(c) This section may be illustrated by the following examples:

Example (1): An employee, through his own fault, causes an overpayment in his annuity.

The employee dies before the overpayment can be recovered from him and he leaves no estate. A widow's annuity is payable on the employee's compensation record. The widow was not at fault in causing the overpayment. The Board may recover the remainder of the overpayment by setoff against the widow's annuity. However, it may forego recovery under this section if such recovery would be contrary to the purpose of the Railroad Retirement Act as defined in § 255.12 of this part. Since this is not a waiver of the overpayment, the Board is free to recover the overpayment from the widow at a later date, for example, if an accrual of benefits should become payable, if it determines that such recovery would not be against the purpose of the Railroad Retirement Act.

Example (2). A representative payee for a retarded child, through her own fault, causes an overpayment in the child's annuity. The overpaid amounts were used for the benefit of the child. The representative payee dies before the overpayment can be recovered from her and she leaves no estate. The Board may not waive the remainder of the overpayment with respect to the child since for purposes of waiver the representative payee is considered the overpaid individual (see § 255.17 of this part) and the overpaid individual was at fault. However, if the child was not at fault in causing the overpayment and recovery would be contrary to the purpose of the Railroad Retirement Act as defined in § 255.12 of this part, then the Board may forego recovery of the overpayment from the child's annuity under this section.

§ 255.17 Recovery of overpayments from a representative payee.

(a) *Joint liability.* In general, if an overpayment is made to an individual receiving benefits as a representative payee (see part 266 of this chapter) the Board may recover the overpayment from either the representative payee or the beneficiary, or both. If the beneficiary is currently receiving benefits, either in his or her own right or through a representative payee, the Board will generally propose to recover the overpayment by setoff against those benefits.

(b) *Waiver of overpayments.* For purposes of § 255.10 of this part (Waiver of recovery), if it is determined that the representative payee was at fault in causing the overpayment there may be no waiver of the overpayment either as to the representative payee or the beneficiary. However, if the beneficiary was not also at fault in causing the overpayment he or she may be eligible for administrative relief from recovery under § 255.16 of this part.

(c) This section may be illustrated by the following examples:

Example (1). M is receiving a child's annuity as a representative payee for her disabled son, S. With M's knowledge S marries. Although both M and S know that marriage terminates the child's annuity, neither of them inform the Board of this event. Both M and S are liable for any overpayment caused. Waiver is not available since M would be considered at fault in causing the overpayment. Administrative relief from recovery is not available to S since he would also be considered at fault.

Example (2). R is a representative payee for B, who resides in a skilled care facility. R is found to be at fault in causing an overpayment of benefits to B. The Board may recover the overpayment from either R or B. Waiver is not available because R was at fault in causing the overpayment. However, if B was not also at fault in causing the overpayment he or she may be entitled to administrative relief from recovery under § 255.16 of this part.

§ 255.18 Compromise of overpayments.

(a) This section sets forth principal standards which the Board uses to determine if an overpayment which may not be waived should be compromised. In addition, the Board may compromise an overpayment under the Federal Claims Collection Standards set forth in 4 CFR part 103.

(b) An overpayment may be compromised under the following circumstances:

(1) The overpayment cannot be collected because of the overpaid individual's inability to pay the full amount of the overpayment within a reasonable time;

(2) The overpaid individual refuses to pay the overpayment in full and it appears that enforced collection procedures will take an inordinate amount of time or that the cost of collecting does not justify the enforced collection of the full amount; or

(3) There is doubt that the Board could prove its case in court for the full amount claimed because of a bona fide dispute as to the facts or because of the legal issues involved.

§ 255.19 Suspension or termination of the collection of overpayments.

This section sets forth the principal standards which the Board applies in approving the suspension or termination of the collection of an overpayment. In addition the Board may suspend or terminate collection under the Federal Claims Collection Standards set forth in 4 CFR part 104.

(a) Collection action on a Board claim may be suspended temporarily when the debtor cannot be located and there is reason to believe future collection action may be productive or collection may be effected by offset in the near future.

(b) Collection action may be terminated when:

(1) The debtor is unable to make any substantial payment;

(2) The debtor cannot be located and offset is too remote to justify retention of the claim;

(3) The cost of collection action will exceed the amount recoverable; or

(4) The claim is legally without merit or cannot be substantiated by the evidence.

Dated: September 12, 1991.

By Authority of the Board.

Beatrice Ezerski,

Secretary to the Board.

[FR Doc. 91-22580 Filed 9-18-91; 8:45 am]

BILLING CODE 7905-01-M

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20 CFR Part 335

RIN 3220-AA93

Sickness Benefits

AGENCY: Railroad Retirement Board.

ACTION: Proposed rule.

SUMMARY: The Railroad Retirement Board (Board) proposes to amend § 335.4(c) of its regulations under the Railroad Unemployment Insurance Act (RUIA) to allow a claimant 30 days (instead of 15) to file a claim for sickness benefits under the RUIA for a particular claim period. The proposed change will improve service by expediting the payment of benefits that otherwise would be delayed pending review and reconsideration by the delayed filing determinations and will provide for more effective use of the agency's resources.

DATES: Comments should be submitted on or before October 21, 1991.

ADDRESSES: Secretary to the Board, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

FOR FURTHER INFORMATION CONTACT: Thomas W. Sadler, Assistant General Counsel, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611, (312) 751-4513 (FTS 386-4513).

SUPPLEMENTARY INFORMATION: Section 5(a) of the RUIA provides that claims for benefits under the RUIA shall be made in accordance with such regulations as the Board shall prescribe. Section 5(b) of the RUIA authorizes the Board to establish by regulation or otherwise any procedure that it deems necessary or proper for the determination of a right to benefits.

Board regulations presently allow a claimant 15 days to file a claim for sickness benefits for a particular claim period (usually a period of 14 consecutive days). See 20 CFR 335.4(c). The 15-day period is measured from the ending date shown on the claim form, or the date on which the Board mailed the claim form to the claimant, whichever date is later. The Board initially denies

benefits to any claimant who does not file his or her claim within that 15-day period. However, as explained in § 335.4(d)(3) of the regulations, failure to file within 15 days may be excused depending on the reason for the delay. To ascertain the reason requires consideration of the response made by the claimant to the notice of the initial denial of benefits.

A recent survey of claims filed after the 15-day time limit elapsed shows that the vast majority of claimants filed their forms late because of circumstances beyond their control, and not because of a lack of diligence. This finding parallels that of an earlier survey of applications that were filed late. These findings reflect the fact that sick and injured claimants are handicapped in their ability to conduct their business and financial affairs. The proposed regulatory change acknowledges that handicap by allowing somewhat more time for filing claims for sickness benefits. The proposed change will improve service by expediting the payment of benefits that otherwise would be delayed pending review and reconsideration of the delayed filing determinations and will provide for more effective use of the agency's resources. In addition, the proposed change is consistent with the overall intent and purpose of the Railroad Unemployment Insurance Act to provide assistance in meeting the temporary financial needs of railroad employees who are out of work because of unemployment, sickness or injury.

Also, under the experience rating provisions of the 1988 amendments to the RUIA (Title VII of Pub. L. 100–647), claims for sickness benefits are subject to prepayment verification with the applicable base year employer, which helps to assure the validity of claims filed by the employees of such employer.

The Board has determined that this is not a major rule for purposes of Executive Order 12291. Therefore, no regulatory analysis is required. The information collections contemplated by this part have been approved by the Office of Management and Budget under control number 3220–0039.

List of Subjects in 20 CFR Part 335

Railroad employees, Railroad sickness benefits.

For the reasons set out in the preamble, title 20, chapter II of the Code of Federal Regulations is proposed to be amended as follows:

PART 335—SICKNESS BENEFITS

1. The authority citation for part 335 continues to read as follows:

Authority: 45 U.S.C. 362(i) and 362(l).

2. Section 335.4(c) is revised to read as follows:

§ 335.4(c) Filing statement of sickness and claim for sickness benefits.

* * * * *

(c) *Claim for sickness benefits.* An employee shall file a claim for sickness benefits within 30 days after the ending date shown on the claim form, or within 30 days after the date on which the Board mails the claim form to the employee, whichever date is later. Failure to comply with this provision shall bar the payment of sickness benefits with respect to any day included within the calendar period covered by the claim form.

Example: If a form for claiming sickness benefits is mailed to an employee on July 13, for the period from July 1 to July 14, the employee must file the claim within 30 days after July 14 (on or before August 13) to be paid benefits for the period July 1 to July 14. If the claim form was not mailed to the employee until July 16, the claim must be filed within 30 days after July 16 (on or before August 15).

* * * * *

Dated: September 11, 1991.

By Authority of the Board.

Beatrice Ezerski,

Secretary of the Board.

[FR Doc. 91–22581 Filed 9–18–91; 8:45 am]

BILLING CODE 7905–01–M

DEPARTMENT OF TRANSPORTATION

Saint Lawrence Seaway Development Corporation

33 CFR Part 402

Tariff of Tolls: Proposed Revision

AGENCY: Saint Lawrence Seaway Development Corporation, DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: The Saint Lawrence Seaway Development Corporation and the St. Lawrence Seaway Authority of Canada have jointly established and presently administer the St. Lawrence Seaway Tariff of Tolls. This Tariff sets forth the level of tolls assessed on all commodities and vessels transiting the facilities operated by the Corporation and the Authority. The Authority is proposing to the Corporation that the definition of "feed grains" be revised to include meal from these grains for animal consumption, which will relieve inequity in the treatment of this meal relative to competing products. The Authority also is proposing to the Corporation that the volume discount be amended as follows: to allow the discount to be based upon commodities shipped from a particular origin, that is a particular country outside of North America and a particular port within North America; that the amount shipped must exceed the five navigation season average by 100,000 tons; and that cargoes subject to new downbound or upbound business refunds not be used in the calculations for volume discounts. This is intended to increase use of this discount and make it more practical.

DATES: Any party wishing to present views or data on the proposed revision may file comments with the Corporation on or before October 21, 1991.

ADDRESSES: Send comments to Marc C. Owen, Chief Counsel, Saint Lawrence Seaway Development Corporation, 400 Seventh Street, SW., Washington, DC 20590.

FOR FURTHER INFORMATION CONTACT: Marc C. Owen, Chief Counsel, Saint Lawrence Seaway Development Corporation, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–0091.

SUPPLEMENTARY INFORMATION: It is proposed to amend the definition of "feed grains" in § 402.3(g) to include meal from the other types of feed grains for animal consumption. These meal products presently are subject to the higher bulk rate even though they compete with other feed grains in feed formulations. The proposed amendment would eliminate this inequity.

It also is proposed that the § 402.11 volume discount be amended as follows: To allow the discount to be based upon commodities shipped from a particular origin, that is a particular country outside of North America and a particular port within North America; that the amount shipped must exceed the five navigation season average by 100,000 tons; and that cargoes subject to new downbound or upbound business refunds not be used in the calculations for volume discounts. The principal purpose of this amendment is to allow rebates under this section to be more effectively available to prospective beneficiaries of volume rebates. By being calculated on the basis of port as well as commodity, it is believed that eligible Seaway users will increase their shipments through the system. In addition, the present volume rebate method can result in increases in shipments from one port being negated by decreases from another port. It is believed that the amendment will resolve this situation.

Regulatory Evaluation

This proposed regulation involves a foreign affairs function of the United States, and therefore, Executive Order 12291 does not apply. This proposed regulation has also been evaluated under the Department of Transportation's Regulatory Policies and Procedures and the proposed regulation is not considered significant under those procedures and its economic impact is expected to be so minimal that a full economic evaluation is not warranted.

Regulatory Flexibility Act Determination

The Saint Lawrence Seaway Development Corporation certifies that this proposed regulation, if adopted, would not have a significant economic impact on a substantial number of small entities. The St. Lawrence Seaway Tariff of Tolls relates to the activities of commercial users of the Seaway, the vast majority of whom are foreign vessel operators. Therefore, any resulting costs will be borne by foreign vessels.

Environmental Impact

This proposed regulation does not require an environmental impact statement under the National Environmental Policy Act (49 U.S.C. 4321, *et seq.*) because it is not a major federal action significantly affecting the quality of human environment.

List of Subjects in 33 CFR Part 402

Vessels, Waterways.

PART 402—[AMENDED]

Accordingly, the Saint Lawrence Seaway Development Corporation proposes to amend part 402—Tariff of Tolls (33 CFR part 402) as follows:

1. The authority citation for 33 CFR part 402 continues to read as follows:

Authority: 68 Stat. 93, 33 U.S.C. 981–990.

2. In § 402.3, paragraph (g) would be revised to read as follows:

§ 402.3 Interpretation.

* * * * *

(g) *Feed grains* means barley, corn, oats, flaxseed, rapesseed, soybeans, field crop seeds, grain screenings, and meal from these grains for animal consumption.

* * * * *

3. Section 402.11 would be revised to read as follows:

§ 402.11 Volume discount.

(a) A volume discount shall be granted to carriers at the end of the 1991, 1992, and 1993 navigation seasons after payment of the full toll specified in the schedule under the tariff in § 402.8 of this part if shipments of a commodity from a particular origin exceed the average amount of shipments from that origin for that commodity in the Seaway during the five navigation seasons immediately preceding the season in which the volume discount is applied by an amount of at least 100,000 tons. The volume discount shall be equal to a 20 percent reduction of the portion of the composite toll related to charges per metric ton of cargo paid for the shipments that surpass the average for the preceding five seasons. The volume discount shall be applied on a pro rata basis to all carriers of the particular commodity from that origin within one navigation season.

(b) For the purposes of this section, *origin* means the country in which the cargo is loaded, except if the cargo is loaded in North America, *origin* means the port at which the cargo is loaded.

(c) If the conditions in paragraphs (a) and (b) of this section are met, a volume discount shall be granted with respect to the following commodities:

(1) Grain;
(2) Other agricultural products;
(3) Iron ore;
(4) Other mine products;
(5) Coal;
(6) Coke;
(7) Petroleum products;
(8) Chemicals;
(9) Stone;
(10) Salt;
(11) Other bulk cargo;
(12) Iron and steel;
(13) Other general cargo;
(14) Containers.

(d) Cargoes having been the subject of a new downbound or new upbound business refund shall be excluded from the statistics used for the calculation of volume discounts.

(e) Notwithstanding anything in this Tariff, a carrier shall not obtain, at the end of a navigation season, both a volume discount and a new downbound or upbound business refund with respect to the same shipment, but a carrier shall obtain the greater of the said discount or refund. Issued at Washington, DC on September 12, 1991.

Saint Lawrence Seaway Development Corporation.

Marc C. Owen,

Chief Counsel.

[FR Doc. 91–22522 Filed 9–18–91; 8:45 am]

BILLING CODE 4910–61–M

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 228

[FRL–3997–6]

Ocean Dumping Regulations; Proposed Dedesignation of a Site

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: EPA today proposes amending the period of use of the Interim Woodburning Site (the "Interim Site") from "continuing" to a period which expires at midnight, December 31, 1993, and dedesignating the Interim Site as of that date. The Interim Site is located approximately 17 nautical miles offshore of Point Pleasant, New Jersey. It is utilized for the burning of waste wood including, driftwood, timbers, wooden hulls, and similar wooden debris generated in New York Harbor and its environs. Today's rule addresses the Water Resources Development Act of 1990 ("WRDA"), which prohibits woodburning at sea after December 31, 1993 and states that EPA shall designate an interim site for such disposal.

EPA today also announces its decision not to designate a permanent New York Harbor Woodburning Disposal Site, previously proposed for designation in the **Federal Register** (54 FR 40415) on October 2, 1989, and to terminate the environmental impact statement (EIS) process related to designation of the site due to the WRDA prohibition of woodburning at sea after December 31, 1993 and requirement that EPA designate an interim site. Further, designation of a new woodburning site would be impractical due to the large amount of time and resources that would be necessary to complete a final EIS and rule that would make a new woodburning at sea site viable for only a short amount of time, at best, prior to the WRDA deadline. As such, any woodburning at sea activities will take place at the current interim site.

The Interim Site will continue to be subject to a seasonal restriction and continuing monitoring to ensure that unacceptable adverse environmental impacts do not occur.

DATES: Comments on this proposed rule must be received on or before November 4, 1991.

ADDRESSES: Send comments to: Mario P Del Vicario, Chief, Marine and Wetlands Protection Branch, EPA Region II, 26 Federal Plaza, New York, New York 10278.

The file supporting this proposed rulemaking is available for public inspection at the following locations:

EPA Public Information Reference Unit (PIRU), room 2904 (Rear), 401 M Street Southwest, Washington, DC 20460.
EPA Regional II Library, room 402, 26 Federal Plaza, New York, New York 10278–0090.
EPA Region II Field Office Library, 2890 Woodbridge Avenue, Building 209, MS–245, Edison, New Jersey 08837.

FOR FURTHER INFORMATION CONTACT: Mario P. Del Vicario, (212) 264–5170.

SUPPLEMENTARY INFORMATION:

A. Background

Section 102(c) of the Marine Protection, Research, and Sanctuaries Act of 1972, as amended, 33 U.S.C. 1412(c) gives the Administrator of EPA the authority to designate sites where ocean dumping may be permitted. On October 1, 1986, the Administrator delegated the authority to designate dredged material and woodburning sites to the Regional Administrator of the region in which the site is located. This site dedesignation action is being proposed pursuant to that authority.

The EPA Ocean Dumping Regulations (40 CFR 228.4) state that ocean dumping sites will be designated by publication in part 228. This site dedesignation is being published as proposed rulemaking in accordance with part 228 of the Ocean Dumping Regulations (40 CFR part 228), which permits the dedesignation of ocean disposal sites. Interested persons may participate in this proposed rulemaking by submitting written comments by November 4, 1991.

On November 30, 1990, the President signed WRDA (Pub. L. 99–662, section 101(v)), which includes an amendment providing that no later than December 31, 1993, EPA shall prohibit the burning at sea of waste wood collected in the New York Harbor area pursuant to the New York Harbor Collection and Removal of Drift Project (the "Project"). WRDA also provides for the continued issuance of permits and the designation of an interim site for such disposal until December 31, 1993, unless an acceptable alternative method is found to be implementable at an earlier date. WRDA defines an acceptable alternative as a method of disposal of wood other than burning on ocean waters that is both environmentally appropriate and economically feasible. For a method to be found to be an implementable acceptable alternative, it must be determined to be an acceptable alternative and implementable by the Regional Administrator of EPA Region II, the District Engineer for the New York District Army Corps of Engineers (COE), the State of New Jersey, and the State of New York. Such determination must be published by EPA in the **Federal Register.**

Under the statutory amendment, effective January 1, 1991, at least half the volume of waste wood collected in carrying out the Project must be disposed of through land-based alternatives. In addition, if bids received for methods other than woodburning are not "substantially greater" in cost, such alternate methods must be selected.

B. EIS Development

Section 102(c) of the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et. seq.*, (NEPA) requires that Federal agencies prepare an environmental impact statement (EIS) on proposals for major Federal actions significantly affecting the quality of the human environment. The object of NEPA is to build into the agency decision-making process careful consideration of all environmental aspects of proposed actions. While NEPA's EIS requirements do not apply, as a matter of law, to EPA activities of this type, EPA has voluntarily committed to prepare EISs in connection with ocean dumping site designations.

In June 1989, EPA published a draft EIS entitled "Draft Environmental Impact Statement for the Designation of an Ocean Woodburning Site for the New York Bight". The notice of availability of the draft EIS for public review and comment was published in 54 **Federal Register** 40415, October 2, 1989. The public comment period on the draft EIS and the proposed rule closed on October 27, 1989.

WRDA requires EPA to prohibit woodburning at sea no later than December 31, 1993 and to designate an interim site for such disposal. As such, EPA hereby terminates the EIS and designation process for a permanent site, proposed in 54 **Federal Register** 40415, October 2, 1989. However, should an implementable acceptable alternative, as defined in WRDA, be developed prior to December 31, 1993, EPA would terminate woodburning at sea at that earlier time as required by WRDA.

C. Interim Site

The interim woodburning site is located approximately 17 nautical miles offshore of Point Pleasant, New Jersey. The site occupies an area of approximately 12.5 square nautical miles, and water depths average 30 meters. The coordinates of the site are as follows:

40° 00′ 00″ to 40° 04′ 20″ N
73° 41′ 00″ to 73° 38′ 10″ W

All of the wooden debris burned at the interim site are from New York Harbor and its environs. No woodburning activities may occur from Memorial Day to Labor Day each year. If at any time prior to midnight December 31, 1993 woodburning operations at the site cause significant adverse impacts, use of the site will be restricted or terminated.

D. Proposed Action

EPA today proposes amending the period of use of the Interim Site from "continuing" to a period which expires at midnight December 31, 1993, and dedesignating the Interim Site as of that date. This action is necessary due to WRDA which prohibits woodburning at sea after December 31, 1993.

EPA solicits public comment on all aspects of this proposed rule.

E. Regulatory Assessments

Under the Regulatory Flexibility Act 5 U.S.C. Section 601 et. seq., EPA is requested to perform a regulatory flexibility analysis for all rules which may have a significant impact on a substantial number of small entities. EPA has determined that this action will not have a significant impact on small entities since after December 31, 1993, use of the Interim Site is barred by law, i.e. WRDA, thus precluding thereafter any involvement with the Interim Site by any small entities. Consequently, this rule does not necessitate preparation of a regulatory flexibility analysis.

EPA must also perform a regulatory impact analysis pursuant to Executive Order 12291, when a regulation is "major". This action will not result in an annual effect on the economy of $100 million or more or cause any other effects which would result in its being classified under the executive order as a "major" rule. Consequently, this rule does not necessitate preparation of a regulatory impact analysis.

This proposed rule does not contain any information collection requirements subject to the Office of Management and Budget review under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 et. seq.

List of Subjects in 40 CFR Part 228

Water pollution control.

Dated: September 4, 1991.

Constantine Sidamon-Eristoff,
Regional Administrator for Region II.

In consideration of the foregoing, part 228 of title 40 of the Code of Federal Regulations is proposed to be amended as set forth below.

PART 228—[AMENDED]

1. The authority citation for part 228 continues to read as follows:

Authority: 33 U.S.C. Sections 1412 and 1418.

2. In § 228.12 paragraph (a)(3) introductory text is proposed to be amended by removing the words, "and the Region II wood incineration site", and by adding a sentence to the end of paragraph (a)(3) to read as follows:

§ 228.12 Delegation of management authority for interim ocean dumping sites.

(a) * * *

(3) * * * The EPA Region II interim wood incineration site shall expire and is dedesignated effective midnight December 31, 1993.

* * * * *

§ 228.12 [Amended]

3. In § 228.12 the table immediately following paragraph (a)(3) is amended by adding to the entry under the right column labeled "primary use" the following new words: "This site expires on midnight December 31, 1993.".

[FR Doc. 22315 Filed 9–18–91; 8:45 am]

BILLING CODE 6560.50–M

FEDERAL MARITIME COMMISSION

46 CFR Part 540

[Docket No. 91–32]

Passenger Vessel Financial Responsibility Requirements for Indemnification of Passengers for Nonperformance of Transportation

AGENCY: Federal Maritime Commission.

ACTION: Advance notice of proposed rulemaking and notice of inquiry; Extension of time for comments.

SUMMARY: On August 15, 1991, the Federal Maritime Commission published an Advance Notice of Proposed Rulemaking and Notice of Inquiry (56 FR 40586), which solicited public comment on its passenger vessel financial responsibility requirements for indemnification of passengers for nonperformance of transportation. The comments received will assist the Commission in determining whether it should amend its regulations at 46 CFR part 540, subpart A. The Federal Maritime Commission also invited the public to comment on the meaning of section 3(b) of Public Law 89–777. The International Council of Cruise Lines ("ICCL") now has requested a 45 day extension of time for filing comments which are now due September 30, 1991. ICCL claims the additional time is needed to allow testing of various financial formulae and resolution of differences among members. The Commission has determined to grant ICCL's request, and extend the time for filing comments to November 14, 1991.

DATES: Comments (original and fifteen copies) on or before November 14, 1991.

ADDRESSES: Send comments to: Joseph C. Polking, Secretary, Federal Maritime Commission, 1100 L Street, NW., Washington, DC 20573–0001, (202) 523–5725.

FOR FURTHER INFORMATION CONTACT: Bryant L. VanBrakle, Director, Bureau of Tariffs, Certification and Licensing, Federal Maritime Commission, 1100 L Street, NW., Washington, DC 20573–0001, (202) 523–5796.

By the Commission.

Joseph C. Polking,

Secretary

[FR Doc. 91–22539 Filed 9–18–91; 8:45 am]

BILLING CODE 6730–01–M

DEPARTMENT OF TRANSPORTATION

National Highway Traffic Safety Administration

49 CFR Part 552

Federal Motor Vehicle Safety Standards; New Pneumatic Tires—Inflation Pressure

AGENCY: National Highway Traffic Safety Administration (NHTSA), Department of Transportation.

ACTION: Denial of petition for rulemaking.

SUMMARY: This notice denies a petition for rulemaking submitted by the Rubber Manufacturers Association (RMA) requesting an amendment to Federal Motor Vehicle Safety Standard No. 109, New Pneumatic Tires for passenger cars, about maximum permissible inflation pressures. Specifically, the petitioner requested that, instead of determining the test inflation pressures based upon the maximum permissible inflation pressure marked on the tire, the agency specify one test inflation pressure for each of the petitioner's suggested load range categories of tires. The agency has decided to deny the petition primarily because it is not aware of any technical data indicating either that there is a safety reason for the change or that there are problems with conducting the current performance testing of passenger car tires. Accordingly, there is no reasonable possibility that the requested amendment would be issued at the conclusion of a rulemaking proceeding.

FOR FURTHER INFORMATION CONTACT: Mr. Larry Cook, Office of Vehicle Safety Standards, National Highway Traffic Safety Administration, 400 Seventh Street, SW., Washington, DC 20590 (202–366–4803).

SUPPLEMENTARY INFORMATION:

Background

Federal Motor Vehicle Safety Standard No. 109, New Pneumatic Tires, specifies dimensions for tires used on passenger cars and laboratory test requirements for bead unseating resistance, strength, endurance, and high speed performance. The standard also defines tire load ratings and specifies labeling requirements for passenger car tires.

The standard requires that each passenger car tire must have a maximum permissible inflation pressure labeled on its sidewall (S4.3). Section 4.2.1(b) list the permissible maximum pressures: 32, 36, 40, or 60 pounds per square inch (psi), or 240, 280, 290, 300, 330, 340, 350, or 390 kiloPascals (kPa). A manufacturer's selection of a maximum pressure determines the pressures at which its tire is tested. For each permissible maximum pressure, Table II of the standard specifies pressures at which the standard's tests must be conducted. The intent of this provision is to limit the number of possible maximum inflation pressures to reduce the likelihood of having tires of the same size on the same vehicle with one maximum load value but with two different maximum permissible inflation pressures. Under the petitioner's request, the potential for confusion increases because the inflation pressure can be any value.

Petition

On January 22, 1991, the Rubber Manufacturers Association (RMA) petitioned the agency to amend Standard No. 109's requirements about maximum permissible inflation pressures. Specifically, it requested that the test inflation pressures be changed from those specified in Table II for each of the maximum permissible inflation pressures listed in section S4.2.1(b) to one test inflation pressure for each of its suggested load range categories of tires: "standard load," "extra load," "T Type temporary spare tires," and "CT tires." Thus, under the petitioner's requested approach, the manufacturer could set the maximum permissible inflation pressure for any particular tire without affecting the test inflation pressures.

In support of its petition, RMA stated that its requested amendment would be more rational, would simplify the

requirements, and would reduce confusion which it believes exists with regard to tire test inflation pressures. The requested amendment would also eliminate the need for rulemaking to amend the list of maximum permissible inflation pressures in S4.2.1(b) each time a manufacturer wishes to introduce a tire with a previously unlisted maximum inflation pressure. The petitioner further stated that in addition to harmonizing Standard No. 109 with the standards of the International Standardization Organization (ISO) and the European Commission for Europe (ECE), its suggested approach would be more consistent with Standard No. 119, New pneumatic tires for vehicles other than passenger cars, which currently uses load ranges to specify testing parameters.

On March 14, 1991, RMA officials met with NHTSA personnel to explain the reasons for its requested rulemaking. Among the potential additional benefits that RMA attributed to its suggested amendments were improved fuel economy, improved vehicle performance and handling, and flexibility in allowing the introduction of new vehicle concepts such as tires for electric cars.

Agency Decision

After reviewing the petition, NHTSA has decided to deny it for the reasons set forth below. Before addressing the petition's substance, the agency notes that while some of the petitioner's stated goals (e.g., harmonization, fuel economy, and the promotion of design flexibility) are commendable, they either would not be accomplished through the petition or are outweighed by safety or other considerations. To begin with, the petitioner did not present any technical data supporting either a safety reason for the change or showing problems with the current performance testing of passenger car tires. In fact, RMA stated at its March 1991 presentation that it was not aware of any significant industry or testing problems with the current standard's test inflation pressures. In addition, the agency is not aware of complaints from manufacturers, test laboratories, or consumers about misinterpreting the maximum inflation pressures.

As for the petitioner's specific statements, RMA has not provided any information supporting its claim that the changes would make the standard more "rational" or "reduce the very real possibility of confusion." Nor did RMA present any technical data explaining the validity of the desired category ranges to cover the performance characteristics of all tires. The agency believes that the standard's current approach is more rational than the one in RMA's petition because it results in a closer relationship between the maximum permissible inflation and test inflation pressures than the petitioner's requested approach. Such a closer relationship is desirable because the performance tests are conducted at the inflation pressure to which consumers most likely inflate their tires. Under the petition, a performance requirement's stringency could be affected depending on the breadth of each category and the test inflation pressure chosen for that category. In addition, the interrelationship among the various test values and the performance requirements in the standard are too complex to be evaluated based on general categories of load range. As explained below, several other factors including section widths, tire types, construction types, wheel size, and cord material are relevant to a passenger care tire's performance. The agency believes that RMA has made no showing of an unnecessary burden in terms of testing difficulties or cost to manufacturers, the agency, or testing facilities. Nor has the petitioner shown that the requested changes would improve the testing of tires. As for confusion, because RMA has not shown any mistakes in selecting test pressures, the petitioner has not supported its claims of confusion with concrete examples.

NHTSA agrees with RMA that the proposal would reduce the number of different test pressures related to testing tires. However, regardless of whether load range determines test pressure or maximum inflation pressure determines test pressure, the tester must still check to see what value for the dependent variable (i.e., test pressure) is specified for a given independent variable (e.g., load range or maximum inflation pressure.)

As for the regulatory burden of having to conduct rulemaking each time a tire with an unspecified maximum permissible inflation pressure is developed, NHTSA notes that in the 23 years since Standard No. 109 was issued, there have been only four amendments to add new test inflation pressures. Even though these amendments take time to evaluate, they have posed a relatively minor burden on the agency.

In regard to international harmonization, NHTSA generally supports efforts to make its standards consistent with those in the international community. Nevertheless, the agency must carefully consider safety and other considerations before it endorses such harmonization efforts. One important consideration is that unlike the European "type approval" system in which manufacturers submit motor vehicles and items of motor vehicle equipment to governments for approval, the United States has a self-certification system in which manufacturers certify that their products comply with the Federal Motor Vehicle safety standards (see section 114 of the National Traffic and Motor Vehicle Safety Act of 1966). Under this country's system, the Federal safety standards must be objective, practicable, and meet the need for safety. As a result, compared to its foreign counterparts, the agency is more cautious about relinquishing its authority to review through the rulemaking process new tires that depend on non-traditional inflation pressures.

A second important consideration is that the petitioner oversimplifies the harmonization process. The petitioner appears to believe that this country should accept, at face value, the European standard and adopt it into our standard, without considerable evaluation and discussion. In fact, the harmonization process is a highly deliberative and complex procedure which involves a structured approach, including commitments of personnel, time, and funding from governments and industry around the world. For instance, an effort to harmonize the passenger car braking standard (proposed Standard No. 135) began early twelve years ago and has yet to result in a final rule. (see 56 FR 30528). As for the harmonization of tire standards, the interrelationships of all the domestic and foreign tire standards would be considered as a whole and at great length. This differs from the petitioner's request which focused on only one part of the standard.

Contrary to the petitioner's statement about uniformity, NHTSA believes that it is appropriate to distinguish between the approaches taken in Standard No. 109 and Standard No. 119 concerning test inflation pressures. These differences are justified because tires used for passenger cars have traditionally had fewer maximum permissible inflation pressures and other variations than tires subject to Standard No. 119. In addition, those persons who use tires subject to Standard No. 119 are more likely to be professional drivers and owners. These persons tend to have more expertise about tires than typical non-professional drivers who use passenger car tires.

The petitioner also appears to have oversimplified the approach taken in

testing tires subject to Standard No. 119. Even though Standard No. 119 uses load ranges in some of its tables to indicate testing parameters, load ranges are never used by themselves to designate a particular test value. Instead, they are always used in combination with other categories of tire and vehicle attributes because some load ranges fit more than one category of tire. Among the various combinations of categories that the standard uses to break down the load ranges are tire characteristics (e.g., motorcycle, 12" rims, 14.5" rims, light truck tires, 17.5" tubeless rims, tube type tires, tubeless tires, and speed restricted tires), cord type (e.g., rayon, nylon, or polyester), load ranges (e.g., A through N) some of which fit more than one category, actual maximum inflation pressure corresponding to the actual maximum load on the tire sidewall (based on dual/single rated tires), test loads based on the percent of actual maximum load rating on the tire sidewall, and percent of actual maximum load rating based on the testing period.

In contrast, Standard No. 109 currently provides a closer relationship between the maximum inflation pressure and the test inflation pressure than would be provided under RMA's requested change. Accordingly, if load ranges were used instead of the permissible maximum inflation pressure as the starting point for determining test pressures, additional attributes similar to the ones in Standard No. 119 might be needed to assure the proper testing of new load ranges. The selection and application of such attributes would require extensive effort which would result in little or no safety benefit.

As for the issue of fuel economy, the agency disagrees with RMA's statement that the petition would assist vehicle manufacturers in meeting the corporate average fuel economy (CAFE) standards. The agency notes that under the fuel economy tests conducted by the Environmental Protection Agency (EPA), the tires are inflated to between 29 psi to 32 psi for the coast down test and 45 psi for the dynamometer test. Because these inflation pressures are independent of the inflation pressures marked on the tire, raising the maximum inflation pressure marked on the tire sidewall would have no effect on fuel economy during the EPA test.

Further, NHTSA does not believe that RMA's petitioned for approach would significantly improve real-world fuel economy. The agency believes that the inflation pressure that the vehicle manufacturer would typically recommend to the consumer would not be the maximum inflation pressure marked on the tire, but a lower value (approximately 29 to 32 psi) to ensure a smooth ride. Thus, for the purposes of real-world fuel economy, it would not matter whether the tire had been labeled with a maximum inflation pressure of a higher value (e.g., 35, 44, or 60 psi.) Fuel economy would not be significantly improved because the tire's rolling resistance at the inflation pressure actually used (i.e., the manufacturer's recommended level) would be greater than the rolling resistance at the maximum permissible inflation pressure. Since higher rolling resistance results in poorer fuel economy, there would be no actual improvement in fuel economy from the RMA's petitioned for approach.

In summary, NHTSA concludes that RMA has not shown that the agency should amend Standard No. 109. For the reasons set forth above, the agency has decided to deny RMA's petition for rulemaking.

Issued on: September 13, 1991.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 91-22604 Filed 9-18-91; 8:45 am]

BILLING CODE 4910-59-M

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49 CFR Part 571

[Docket No. 91-12; Notice 1]

RIN 2127-AD98

Federal Motor Vehicle Safety Standards; Lamps, Reflective Devices, and Associated Equipment

AGENCY: National Highway Traffic Safety Administration (NHTSA), DOT.

ACTION: Notice of proposed rulemaking.

SUMMARY: This notice proposes an amendment to Motor Vehicle Safety Standard No. 108 to permit "Combination Headlamp Systems", headlighting systems in which the upper and lower beams could be provided by two types of dissimilar headlamps, combining aspects of performance of the two types but within a single headlamp. A manufacturer could select upper and lower beam providers from three types of dissimilar headlamps: Type F sealed beams, integral beams, and replaceable bulb headlamps, providing that the lamps were designed to conform to the photometrics of Figures 15 or 17 of Standard No. 108. These specifications allow simultaneous use of both upper and lower beams. The adoption of the proposal would promote implementation of high intensity discharge headlighting technology in the relatively near future, which, when used as a lower beam, must remain activated when the upper beam is engaged. This rulemaking implements the grants of petitions for rulemaking submitted by Koito Manufacturing Company and Hella KG Hueck.

DATES: The comment closing date for the proposal is November 18, 1991. The effective date of the amendments would be 30 days after publication of the final rule in the **Federal Register**.

ADDRESSES: Comments should refer to the docket number and notice number and be submitted to: Docket Section, room 5109, Nassif Building, 400 Seventh Street, SW., Washington, DC 20590. [Docket hours are from 9:30 a.m. to 4 p.m.]

FOR FURTHER INFORMATION CONTACT: Jere Medlin, Office of Rulemaking, NHTSA (202-366-5276).

SUPPLEMENTARY INFORMATION: Federal Motor Vehicle Safety Standard No. 108, *Lamps, Reflective Devices and Associated Equipment*, presently allows motor vehicles to be equipped with one of three types of headlighting systems. These are sealed beam systems as specified by S7.3 (Types A through G), integral beam systems as specified by S7.4, and replaceable bulb systems as specified by S7.5.

In response to recent requests for interpretation from two headlamp manufacturers, Koito Manufacturing Co. (Koito), and Hella KG Hueck (Hella), and a lighting engineer, Gordon Bonvallet, NHTSA advised that Standard No. 108 required that both the upper and lower headlamp beams be provided by the same headlighting system. Foreseeing such an interpretation, Koito asked that its letter be treated as a petition for rulemaking to allow intermixing of headlamp systems, so that the upper beam and lower beam could be provided by the different headlighting systems. After Hella received its interpretation, it petitioned for similar rulemaking. Koito, Hella, and Mr. Bonvallet inquired with respect to specific headlighting system designs. In the Koito system, the lower beam would be provided by a replaceable bulb headlamp and the upper beam by an integral beam lamp, either as separate headlamps, or combined as a single headlamp. In the Hella and Bonvallet systems, the lower beam would be provided by an integral beam headlamp, and the upper beam by a replaceable bulb headlamp combined as a single headlamp. For the reasons discussed below, NHTSA grants these petitions, and implements the grants

through the proposal set forth in this notice.

It has been the agency's goal for a number of years to reduce regulatory restrictions inhibiting design freedom in motor vehicle lighting if those restrictions are not necessary for safety. NHTSA has reviewed its specifications for headlamps and has tentatively determined that some intermixing of headlamp systems may be allowed without apparent effect upon safety. Furthermore, this may be accomplished by relatively simple amendments to Standard No. 108.

Initially, the headlamps and associated photometrics specified by Standard No. 108 were those of the Society of Automotive Engineers (SAE), specifically, headlamps of sealed beam design and photometrics of SAE Standard J579. these specifications did not provide for simultaneous use of the upper and lower beam. During the 1980's manufacturers developed systems in which the lower beam supplemented the upper beam. NHTSA amended Standard No. 108 to allow headlamps of new design, and adopted modified photometric specifications (Figure 15 for four lamp systems, Figure 17 for two lamp systems) allowing simultaneous use of all headlamps in a headlighting system for achieving the upper beam. Thus, in the past 10 years Standard No. 108 has been amended to allow Types E through H sealed beam headlamps, replaceable bulb headlamps (with Type HB1 through HB5 light sources), and integral beam systems. Type F sealed beam headlamps must meet the photometrics of Figure 15. Replaceable bulb headlamps with Type HB2, HB3, and HB4 light sources must meet the photometrics of Figures 15/17. Integral beam headlamps may meet the photometry requirements of either Figures 15/17 or SAE J579 DEC84. Headlamps with HB1 and/or HB5 light sources, and all sealed beam headlamps other than Type F must meet the photometry requirements of SAE J579 DEC84. Headlamps with HB1 and HB5 light sources used in combination with any light source other than HB1 or HB5 must meet the photometry of Figures 15/17.

Because the Koito and Bonvallet systems would incorporate headlamps designed to conform to the photometrics of Figures 15/17, and NHTSA is unaware of any desire to mix headlamp systems designed to conform to SAE J579 DEC84 (and has a reservation, discussed below), the agency is directing its proposal to the intermixing of headlamp systems designed to provide simultaneous beam use, those designed with Figures 15/17 in mind. For some years, gaseous, or high intensity discharge (HID) headlamps have been under development, and NHTSA is aware of the desire of some manufacturers to introduce the lamps on production vehicles. It is probable that the initial application of HIDs as in the Bonvallet design, will be as lower beam integral beam headlamps. Unlike other headlamps, all of which provide full intensity of illumination within one second after activation, the HID, at its present state of development, requires one to three seconds to reach its full photometric potential. This time lag is acceptable upon initial activation of an HID, but not acceptable during a beam change from upper to lower, where a period of one to three seconds can occur during which the level of illumination is below minimum requirements. Once a lower beam HID is activated, it is assumed that it would remain activated. Thus, today's use of HID light sources is really limited to a system allowing simultaneous use of lower and upper beams since the lower (HID) beam may remain on. Because of the time lag required for full illumination, a lower beam HID is not acceptable in a system designed to the photometrics of SAE J579 DEC84, in which the lower beam must be extinguished when the upper beam is activated, because of the one to three second "blackout" that would occur upon return to the lower beam. Similarly, with the present state of HID development, an upper beam HID would be unacceptable with such a blackout effect when switching from lower to upper beam.

Additionally, the lamps emitting lower beams must be of the same type and provide a symmetrical effective projected luminous lens area when illuminated. This will allow body designers the freedom to choose an assymetrical front lighting design, but will ensure that existing visual cues are retained when the headlamps are in operation that identify an approaching vehicle as a passenger car, multipurpose passenger vehicle, truck, or bus, rather than as a motorcycle.

In consideration of the foregoing, NHTSA is proposing that Standard No. 108 be amended to allow a new category of headlighting system, to be known as a "Combination Headlamp System". Each lamp of a four lamp combination system would be designed to conform to the photometries of Figure 15. The lower beam could be provided by a Type LF sealed beam, a replaceable bulb, or an integral beam headlamp. The upper headlamp could be either a replaceable bulb, Type UF sealed beam, or an integral beam headlamp as long as it is not the same type as the lower beam headlamp. Each headlamp in a two lamp system would incorporate two distinct sources of illumination, similar to current replaceable bulb headlamps in two lamp systems that often incorporate two light sources, each with single filament. However, the two sources of illumination (i.e., the two headlamps) would themselves be dissimilar types. In a two lamp combination system, the lowr beams could be provided by either an integral beam headlamp that shares the headlamp housing with a headlamp other than an integral beam type, or a replaceable bulb headlamp that shares the headlamp housing with a headlamp other than a replaceable bulb type. The upper beam in a two lamp system would be provided by a replaceable bulb headlamp or an integral beam headlamp, also sharing the same headlamp housing. Each beam in such a headlamp system would be designed to conform to the photometrics of Figure 17. Headlamps thus composed would be, in part, a replaceable bulb headlamp subject to the requirements for that type, and, in part, an integral beam headlamp, subject to the requirements for that type.

Effective Date

Because the amendment would relieve a design restriction, and impose no additional burden upon any regulated party, it is tentatively found for good cause shown that an effective date earlier than 180 days after issuance of the final rule would be in the public interest. The amendment would be effective 30 days after publication of the final rule in the **Federal Register**.

Rulemaking Analyses

Executive Order 12291 (Federal Regulation) and DOT Regulatory Policies and Procedures

NHTSA has considered the impacts of this rulemaking action and has determined that it is not major within the meaning of Executive Order 12291 "Federal Regulation," or significant under Department of Transportation regulatory policies and procedures. It does not involve a matter of substantial Congressional and public interest. The rulemaking would not have an effect upon the economy in excess of $100 million a year. It would provide an alternate means of compliance with existing requirements. Accordingly, a Regulatory Evaluation has not been prepared.

Regulatory Flexibility Act

The agency has also considered the effects of this proposed rule in relation

to the Regulatory Flexibility Act. I certify that this proposed rule would not have a significant economic effect upon a substantial number of small entities. Headlamp and vehicle manufacturers are generally not small businesses within the meaning of Regulatory Flexibility Act. Further, small organizations and governmental jurisdictions would not be significantly affected as the rule would not require vehicles to be equipped with mixed types of headlighting systems. Accordingly, no Regulatory Flexibility Analysis has been prepared.

Executive Order 12612 (Federalism)

This action has been analyzed in accordance with the principles and criteria contained in Executive Order 12612 on "Federalism." It has been determined that the proposed rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

National Environmental Policy Act

NHTSA has analyzed this proposed rule for purposes of the National Environmental Policy Act. The proposed rule would not have a significant effect upon the environment. It does not require any change in the manufacture of headlamps. The rule would not have an effect upon fuel consumption.

Request for Comments

Interested persons are invited to submit comments on the proposal. Please submit 10 copies of written comments and 2 copies of films, tapes, and other materials. All comments must be limited not to exceed 15 pages in length (49 CFR 553.21). Necessary attachments may be appended to these submissions without regard to the 15-page limit. This limitation is intended to encourage commenters to detail their primary arguments in a concise fashion.

If a commenter wishes to submit certain information under a claim of confidentiality, three copies of the complete submission, including purportedly confidential information, should be submitted to the Chief Counsel, NHTSA, at the street address given above, and seven copies from which the purportedly confidential information has been deleted should be submitted to the docket section. A request for confidentiality should be accompanied by a cover letter setting forth the information specified in the agency's confidential business information regulation (49 CFR part 512).

All comments received before the close of business on the closing date indicated above will be considered, and will be available for examination in the docket at the above address both before and after that date. To the extent possible, comments filed after the closing date will also be considered. However, the rulemaking action may proceed at any time after that date, and comments received after the closing date and too late for consideration in regard to the action will be treated as suggestions for future rulemaking. NHTSA will continue to file relevant material as it becomes available in the docket after the closing date, and it is recommended that interested persons continue to examine the docket for new material.

Those persons desiring to be notified upon receipt of their comments in the rules docket should enclose, in the envelope with their comments, a self-addressed stamped postcard. Upon receiving the comments, the docket supervisor will return the postcard by mail.

List of Subjects in 49 CFR Part 571

Imports, Motor vehicle safety, Motor vehicles.

PART 571—FEDERAL MOTOR VEHICLE SAFETY STANDARDS

In consideration of the foregoing, it is proposed that 49 CFR part 571 be amended as follows:

1. The authority citation for part 571 would continue to read as follows:

Authority: 15 U.S.C. 1392, 1401, 1403, 1407; delegation of authority at 49 CFR 1.50.

§ 571.108 [Amended]

Section 571.108 is amended as follows:

2. Paragraph S7.6 would be redesignated S7.7.

3. Paragraphs S7.7, S7.7.1, S7.7.2, S7.7.2.1, S7.7.2.2, S7.7.3, S7.7.4, S7.7.5, S7.7.5.1, and S7.7.5.2 would be redesignated respectively S7.8, S7.8.1, S7.8.2, S7.8.2.1, S7.8.2.2, S7.8.3, S7.8.4, S7.8.5, S7.8.5.1, and S7.8.5.2.

4. In redesignated paragraph S7.8.2.1(b), the reference to "S7.7.5.2(b)(3)" would be changed to "S7.8.5.2(b)(3)."

5. In redesignated paragraph S7.8.2.2, the reference to "S7.7.3 and S7.7.4" would be changed to "S7.8.3 and S7.8.4."

6. In redesignated paragraph S7.8.5.1(a), the reference to "S7.7.5(d)(1)" would be changed to "S7.8.5(d)(1)."

7. In redesignated paragraph S7.8.5.1(c), the reference to "S7.7" would be changed to "S7.8."

8. In redesignated paragraph S7.8.5.2(b)(3), the reference to "S7.7.2.1" would be changed to "S7.8.2.1."

9. In redesignated paragraph S7.8.5.2(c)(3)(ii)(D), the reference to "S7.7.5.1(c)" would be changed to "S7.8.5.1(c)."

10. In redesignated paragraph S7.8.5.2(c)(3)(ii)(E), the reference to "S7.7.5.2(c)(1) and (2)" would be changed to "S7.8.5.2(c)(1) and (2)."

11. In paragraph S7.4(a)(3), the reference to "S7.7.5.2" would be changed to read "S7.8.5.2."

12. In paragraphs S7.4(e), S7.5(d)(1), and S7.5(e)(1), the reference to "S7.7.5.1" would be changed to "S7.8.5.1."

13. In paragraphs S7.4(f) and S7.5(c), the reference to "S7.7.1" would be changed to "S7.8.1."

14. In paragraphs S7.4(g) and S7.5(h), the reference to "S7.7" would be changed to "S7.8."

15. Paragraph S7.1 would be revised to read:

"S7.1 Each passenger car, multipurpose passenger vehicle, truck, and bus shall be equipped with a headlighting system designed to conform to the requirements of S7.3, S7.4, S7.5, or S7.6."

16. New Paragraphs S7.6, 7.6.1, 7.6.2, 7.6.2.1, 7.6.2.2 and 7.6.3 would be added to read:

"S7.6 *Combination Headlighting System.* A combination headlighting system shall be comprised of either two headlamps designed to conform to the requirements of S7.6.2, or any combination of four headlamps designed to conform to the requirements of S7.3.7, S7.4, or S7.5 of this standard.

S7.6.1 A combination headlighting system shall provide in total not more than two upper beams and two lower beams. When installed on a motor vehicle, the headlamps (or parts thereof) that provide the lower beam shall be of the same type, and provide a symmetrical effective projected luminous lens area when illuminated.

S7.6.2 In a combination headlighting system consisting of two headlamps, each headlamp shall be designed to conform to Figure 17, and shall be a combination of an integral beam headlamp and a replaceable bulb headlamp.

S7.6.2.1 That part of the headlamp which contains an integral beam headlamp shall be designed to conform to the requirements of S7.4 (c) through (i) of this standard.

S7.6.2.2 That part of the headlamp which contains a replaceable bulb headlamp shall be designed to conform to the requirements of S7.5 of this standard.

S7.6.3 In a combination headlighting system consisting of four headlamps, each headlamp shall be designed to conform to Figure 15.

Issued on: September 13, 1991.

Stanley R. Scheiner,

Acting Associate Administrator for Rulemaking.

[FR Doc. 91-22509 Filed 9-18-91; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 611 and 655

[Docket No. 910926-1226]

RIN 0648-AE19

Atlantic Mackerel, Squid, and Butterfish Fisheries

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Proposed rule.

SUMMARY: NMFS issues this proposed rule that would implement Amendment 4 to the Fishery Management Plan for the Atlantic Mackerel, Squid, and Butterfish Fisheries (FMP). The amendment is under review by the Secretary of Commerce (Secretary). If approved, the amendment would: (1) Allow annual catch specifications to be established for up to 3 years; (2) eliminate the existing foreign fishing "windows" and allow the Director, Northeast Region, NMFS (Regional Director), to limit times and areas in which foreign directed fishing may occur; (3) allow the Assistant Administrator to impose special conditions on joint ventures and directed foreign fishing, including the requirement that owners and operators of foreign vessels purchase domestic harvested and processed fish in relation to the allocation of the total allowable level of foreign fishing (TALFF) to the Nation of the flag vessel; and (4) revise the definition of overfishing for Atlantic mackerel.

DATES: Comments on the proposed rule must be received on or before October 28, 1991.

ADDRESSES: Send comments on the proposed rule and the amendment to Richard B. Roe, Director, Northeast Region, National Marine Fisheries Service, One Blackburn Drive, Gloucester, MA 01930.

Copies of the amendment, environmental assessment (EA), and Regulatory Impact Review (RIR), and other supporting documents are available upon request from John C. Bryson, Executive Director, Mid-Atlantic Fishery Management Council, room 2115, Federal Building, 300 South New Street, Dover, DE 19901.

FOR FURTHER INFORMATION CONTACT: Myles Raizin, Resource Policy Analyst, 508-281-9104.

SUPPLEMENTARY INFORMATION: Amendment 4 makes refinements to the Atlantic mackerel, squid, and butterfish fisheries management regime. The current regime sets a biologically based allowable biological catch (ABC) for each year, from which specifications of optimum yield (OY) are derived. The OY takes economic, social, and ecological factors into consideration under the constraint of the ABC. Domestic annual processing (DAP), domestic annual harvest (DAH), joint venture processing (JVP), and TALFF are based on the OY specifications. These specifications are recommended annually by the Mid-Atlantic Fishery Management Council (Council). The Regional Director makes preliminary and final specification determinations for the fishery based on consultations with the Council and comments from the public. For the purpose of annual specifications, the FMP uses a fishing year of January 1 through December 31. The actual fishing season is prosecuted from November through March. The OY may be adjusted upward to the ABC during the fishing year to accommodate DAH needs. Any adjustments to the OY are published in the **Federal Register** and with a public comment period.

In recent years, the Council has recommended that special conditions be imposed on foreign fishing through the foreign fishing permits. These conditions have included the imposition of ratios of directed catch to joint venture and purchased domestic production. Ratios are a method to distribute allocation in exchange for over-the-side purchases and purchases of domestically processed product.

Although boundaries, or windows, in which directed foreign fishing may occur are specified in 50 CFR part 611, the foreign vessels have been granted the right to fish outside of them for several years.

Four management measures are proposed in Amendment 4. The management measures would: (1) Change the period in which specifications apply from 1 year (annual) to 3 years; (2) eliminate the existing foreign fishing "windows" and allow the Regional Director to limit areas in which foreign fishing can occur; (3) allow the Assistant Administrator to impose special conditions on foreign fishing, including ratios; and (4) revise the overfishing definition for Atlantic mackerel. A notice of availability for the proposed amendment was published in the **Federal Register** (56 FR 40871, August 16, 1991).

The first is proposed in response to a need for a longer planning horizon on the part of foreign firms to conduct their joint venture operations. It is noted that the earliest the final specifications can be published under the current regulations is on or about December 15. Since the specifications may change at any time between Council submission and final publication, in the past, foreign firms have delayed fishing until the final specifications have been published, and in many instances have not been able to take their allocation until late fall. The lengthening of the period for which specifications apply would encourage a more orderly prosecution of this fishery. However, the Regional Director would have the authority to alter the specifications during that period.

The second measure proposes changes to the foreign fishing regulations, 50 CFR part 611. The measure would eliminate existing trawling areas of the Northwest Atlantic Ocean specified in Figure 1 of § 611.50, commonly referred to as "windows." The "windows" are vestiges of management measures that were used to reduce gear conflicts and to mitigate the effect that large foreign fleets had on the squid resource. For several years, few foreign vessels have been permitted to fish in the exclusive economic zone (EEZ) due to the declining availability of TALFF. These vessels have been authorized by the Regional Director to fish outside the established "windows." Thus, the "windows" have been rendered obsolete. This proposed rule would retain northern and southern boundaries and establish a 20-mile buffer zone from the baseline from which the territorial sea is measured. No foreign fishing, other than in support of joint ventures, may occur in this area. The Regional Director may modify this zone or establish northern or southern boundaries to minimize conflicts with marine recreational vessels or capture of prohibited species.

The third measure would be added to allow the imposition of special conditions and restrictions on the foreign fishery. Although ratios have been used for several years to aid in developing the domestic fishing industry, NMFS believes the ratio-setting process should be provided for in the FMP.

The fourth measure would revise the Atlantic mackerel overfishing definition from the catch of Atlantic mackerel exceeding the annual quota to one based on maintaining a minimum

spawning stock biomass of 600,000 metric tons, while allowing for a predicted catch in Canadian waters, and a fishing mortality rate that fluctuates according to the size of the stock.

The proposed rule varies from the text submitted by the Council in two respects: (1) Because some of the proposals affect foreign fishing, they are placed in § 611.50 of the foreign fishing regulations instead of in part 655. (2) procedural requirements have been added in both parts to comply with the Administrative procedure Act.

Classification

Section 304(a)(1)(D)(ii) of the Magnuson Act requires the Secretary to publish regulations proposed by a Council within 15 days of receipt of the amendment and regulations. At this time, the Secretary has not determined that the amendment these rules would implement is consistent with the national standards, other provisions of the Magnuson Act, and other applicable law. The Secretary, in making that determination, will take into account the data, views, and comments received during the comment period.

The proposed rule is exempt from the procedures of E.O. 12291 under section 8(a)(2) of that order. It is being reported to the Director, Office of Management and Budget (OMB), with an explanation of why it is not possible to follow procedures of that order.

The Council prepared an environmental assessment (EA) for the amendment that is included in the document. The Council concluded that there will be no significant impact on the environment as a result of this rule. You may obtain a copy of the EA from the council (see **ADDRESSES**).

The Assistant Administrator for Fisheries, NOAA, has initially determined that this proposed rule is not a "major rule" requiring a regulatory impact analysis under E.O. 12291. The proposed rule, if adopted, is not expected to have an annual impact on $100 million or more, or to lead to an increase in costs or prices to consumers, individual industries, Federal, state, or local government agencies, or geographic regions. No significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of U.S.-based enterprises to compete with foreign-based enterprises in domestic or export markets are anticipated. You may obtain a copy of the draft RIR from the Council (see ADDRESSES).

The proposed rule contains no collection-of-information requirements subject to the Paperwork Reduction Act.

The General Counsel of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule, if adopted, would not have a significant impact on a substantial number of small entities. The measures do not lead to a decrease or increase in effort exerted on the stock of Atlantic mackerel, nor do they limit the amounts available to U.S. producers.

The Council determined that this rule would be implemented in a manner that is consistent, to the maximum extent practicable, with the approved coastal management programs of New Hampshire, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, and Virginia. This determination has been submitted for review by the responsible State agencies under section 307 of the Coastal Zone Management Act. The State of Maine has responded previously that fishery management is not a listed activity under Maine's coastal management program and that no consistency review is required.

This proposed rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

List of Subjects

50 CFR Part 611

Fishing, Fisheries, Foreign relations, Reporting, and recordkeeping requirements.

Part 655

Fishing, Fisheries, Vessel permits and fees.

Dated September 13, 1991.

Samuel W. McKeen,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR chapter VI is proposed to be amended as follows:

PART 611—FOREIGN FISHING

1. The authority citation for part 611 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*, 16 U.S.C. 1971 *et seq.*, 22 U.S.C. 1971 *et seq.*, and 16 U.S.C. 1361 *et seq.*

2. Section 611.50 is proposed to be amended by removing Figure 1., and Table 1., and revising paragraph 611.50(b)(2) to read as follows:

§ 611.50 Northwest Atlantic Ocean fishery.

* * * * *

(b) * * *

(2) *Time and area restrictions.* (i) Fishing, including processing, scouting, and support of foreign or U.S. vessels, is prohibited south of 35° 00′ N. latitude, and north and east of a line beginning at the shore at 44°22′ N. latitude, 67°52′ W. longitude and intersecting the boundary of the EEZ at 44°11′12″ N. latitude, 67°16′46″ W. longitude.

(ii) Foreign directed fishing under provisions of this section, other than joint venture support by foreign vessels, may not be conducted in the EEZ shoreward of 20 nautical miles from the baseline from which the territorial sea is measured.

(iii) The Assistant Administrator shall modify the 20 nautical mile buffer zone or northern or southern boundaries or establish other area restrictions on foreign fishing if necessary to address national security concerns.

(iv) The Regional Director may modify the 20 nautical mile buffer zone or northern or southern boundaries or establish other time and area restrictions if he determines that:

(A) The restriction will enhance the availability of fish to domestic fishermen;

(B) The restriction will reduce the amount of the bycatch of certain nontarget species;

(C) The restriction will reduce gear conflicts between domestic and foreign fishermen; or

(D) The restriction will enhance the conservation and management of the fishery.

(v) The Regional Director shall consult with the Council prior to giving notice of any area or time restriction. The Secretary shall also consult with the Coast Guard if the restriction appears to be appropriate, he shall publish a notice of the proposed restriction in the **Federal Register** together with a summary of the information on which the restriction is based. Following a 30-day comment period, he shall publish a final notice.

(vi) The Regional Director may rescind any restriction if he determines that the basis for the restriction no longer exists.

(vii) Any notice of restriction shall operate as a condition imposed on the permit issued to the foreign vessels involved in the fishery.

* * * * *

PART 655—ATLANTIC MACKEREL, SQUID, AND BUTTERFISH FISHERIES

3. The authority citation for part 655 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

4. Section 655.22 is proposed to be amended by revising paragraphs (a), (b), (c), and (d), redesignating paragraph (f)

as paragraph (g), and adding a new paragraph (f) to read as follows:

§ 655.22 Procedures for determining initial annual amounts and adjustments.

(a) On or about October 15 of each year, the Council will prepare and submit recommendations to the Regional Director of the initial annual amounts for the fishing year beginning January 1, or the continuing validity of annual specifications for the upcoming fishing year established under paragraph (f) of this section, based on information gathered from sources specified in paragraph (e) of this section. The Council may also recommend, in order to facilitate development of the U.S. fishery, special conditions on joint ventures and foreign directed fishing activities. Such conditions may include certain ratios of TALFF to purchases of domestic-harvested fish and/or domestic-processed fish in relation to the initial annual amounts.

(b) On or about November 1 of each year, unless annual specifications have been established under paragraph (f)(1) of this section, the Secretary will publish a notice in the **Federal Register** that specifies preliminary initail amounts of OY, DAH, DAP, JVP, TALFF, and reserve (if any) for each species. The amounts will be based on information submitted by the Council and from the sources specified in paragraph (e) of this section; in the absence of a Council report, the amounts will be based on information gathered from sources specified in paragraph (e) of this section and other information considered appropriate by the Regional Director. If the preliminary initial amounts differ from those recommended by the Council, the notice must clearly state the reason(s) for the difference(s) and specify how the revised specifications satisfy the 9 criteria set forth above for the species affected. The **Federal Register** notice will provide for a 30-day comment period.

(c) The Council's recommendation and the information listed in paragraph (e) of this section will be available in aggregate form for inspection at the office of the Regional Director during the public comment period. The Council's report on specifications established under paragraph (f)(1) of this section will also be available for inspection at the office of the Regional Director upon receipt from the Council.

(d) On or about December 15 of each year, unless annual specifications have been established under paragraph (f)(1) of this section, the Secretary will make a final determination of the initial amounts for each species, considering all relevant data and any public comments, and will publish a notice of the final determination and response to public comments in the **Federal Register** If the final amounts differ from those recommended by the Council, the notice must clearly state the reason(s) for the difference(s) and specify how the revised specifications satisfy the 9 criteria set forth above for the species affected.

* * * * *

(f)(1) In accordance with the procedures set forth in this section, the Council may prepare recommendations for initial annual amounts for 3 consecutive fishing years.

(2) The Secretary may adjust these annual amounts upward or downward to produce the greatest overall benefit to the United States at any time prior to or during the fishing years for which the annual specifications were set, by publishing a notice and providing for a 30-day comment period, followed by publication of a final notice.

[FR Doc. 91-22564 Filed 9-13-91; 5:06 pm]
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50 CFR Part 663

[Docket No. 910802-1202]

RIN 0648-AE09

Pacific Coast Groundfish Fishery

AGENCY: National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Proposed rule.

SUMMARY: NOAA proposes to restrict the commercial and recreational harvests of black rockfish, *Sebastes melanops*, from Leadbetter Point, Washington, to the U.S./Canada border. This proposed action, based on a recommendation by the Pacific Fishery Management Council (Council), would: (1) Reduce the recreational daily bag limit for all rockfish from 15 to 12 fish; (2) impose non-Indian commercial black rockfish trip and retention limits on hook-and-line fisheries of 100 pounds (45.4 kg) or 30 percent of the total catch of all species, whichever is greater, in portions of the area; and (3) establish coastal treaty Indian commercial harvest guidelines for all rockfish in portions of the area. This proposed action is intended to reduce both commercial and recreational fishing effort on black rockfish in the Westport and Neah Bay areas of the Washington coast, thereby reducing fishing mortality, and to ensure a viable recreational harvest of black rockfish in the important recreational fishing areas adjacent to these coastal ports.

DATES: Comments on the proposed rule must be received on or before October 16, 1991.

ADDRESSES: Comments on the proposed rule should be sent to Mr. Rolland A. Schmitten, Director, Northwest Region, National Marine Fisheries Service, 7600 Sand Point Way NE., Seattle, WA 98115. Copies of an Environmental Assessment/Regulatory Impact Review prepared for this action are available from the same address.

FOR FURTHER INFORMATION CONTACT: William L. Robinson at 206-526-6140.

SUPPLEMENTARY INFORMATION: The domestic and foreign groundfish fisheries in the Exclusive Economic Zone (EEZ) in the Pacific Ocean off the coasts of Washington, Oregon, and California are managed by the Secretary according to the Pacific Coast Groundfish Fishery Management Plan (FMP) prepared by the Council under the authority of the Magnuson Fishery Conservation and Management Act (Magnuson Act). The FMP is implemented by regulations for U.S. fishermen at 50 CFR part 663. General regulations that also pertain to U.S. fishermen are at 50 CFR part 620. Amendment 4 to the FMP, as set forth in section III.B.(c) of the appendix to part 663 (the socioeconomic framework), provides the authority, guidelines, and criteria for recommending management measures to the NMFS Northwest Regional Director (Regional Director) that address social and economic conditions within the fishery. These measures can be implemented by regulation, without further amending the FMP.

In accordance with the socioeconomic framework process, the Council, at its July 1990 public meeting, identified the need to consider management measures for black rockfish off Washington, north of Leadbetter Point, to address the issue of decreased availability of black rockfish stocks in the areas adjacent to two important recreational fishing ports (Westport and Neah Bay, Washington), and the potential adverse impacts of local depletion on the local charterboat industry. An analysis of the need for black rockfish management, recommendations for commercial and recreational fishery restrictions, and an analysis of impacts of various management measures were presented to the Council at its September and November 1990 public meetings. At its November 1990 public meeting, the council adopted four alternatives for further analysis and public review and comment. The council took final action at its March 1991 public meeting and

recommended restrictions on the recreational and commercial harvests of black rockfish to the Regional Director for approval and implementation. The Council recommended: (1) A reduction in the daily bag limit from 15 to 12 rockfish for the recreational fishery north of Leadbetter Point (46°38'10" N. latitude); (2) a trip limit of 100 pounds or 30 percent of total landed (round) weight, whichever is greater, of black rockfish for non-Indian commercial vessels using hook-and-line gear in the area from the U.S./Canada border to Cape Alava (48°09'30" N. latitude) and from Destruction Island (47°40'00" N. latitude) to Leadbetter Point; (3) no restrictions on commercial harvest of black rockfish in waters between Destruction Island and Cape Alava other than current trip limit restrictions and harvest guidelines that apply to the *Sebastes* complex; and (4) a 1991 harvest guideline for coastal treaty Indian (Makah, Quileute, Hoh, and Quinault) commercial harvests of all species of rockfish of 51,000 pounds (23.1 mt) north of Cape Alava and 10,000 pounds (4.5 mt) between Destruction Island and Leadbetter Point. Tribal ceremonial and subsistence fisheries would not be restricted.

Background

The socioeconomic framework requires preparation of a report containing the proposed management measure and the reasons it is preferred, a description of other viable alternatives considered, and an analysis that addresses how the proposed action will achieve the goals and objectives of the FMP, likely impacts on other management measures and other fisheries, biological and economic impacts, and the ability of the preferred option to achieve one or more of fifteen factors listed in the Amendment. The Environmental Assessment/Regulatory Impact Review (EA/RIR) prepared by the Council serves as this report. Any interested member of the public may obtain the EA/RIR from the address listed at the beginning of this notice. The contents of these documents are summarized below.

The primary issue addressed by the Council was the development of management measures to reduce fishing pressure on black rockfish in the areas off Westport and Neah Bay, Washington. The Council determined that the decreasing availability of black rockfish is adversely impacting the local recreational charterboat fishery and is causing conflicts between the commercial and recreational fisheries. Recreational and commercial hook-and-line jig fisheries target on black rockfish, while salmon troll, bottomfish troll, longline, and trawl fisheries take black rockfish incidental to fishing on other species. Black rockfish is the primary target species of the coastal recreational non-salmon fisheries that operate out of Westport and Neah Bay, Washington, comprising over 80 percent of the bottomfish catch. Sport fishing for rockfish has become an important part of the charterboat fleet's annual fishing business as a result of drastically shortened salmon seasons over the past few years. The coastal recreational fishery for groundfish has grown rapidly since 1980, reaching over 46,000 angler trips in 1988, which accounted for over 41 percent of the total coastal recreational effort. Landings of black rockfish in the coastal recreational fishery approached one million pounds in 1988 dropping to just over 850,000 pounds in 1989. In order to attract clientele, the recreational charterboat fisheries for black rockfish are dependent upon relatively high catch rates from areas reasonably close to port. Although black rockfish availability has declined in the areas off Westport and Neah Bay, signs of biological stress are not yet evident. Charterboat operators have testified that they have had to increase the length of fishing trips and the distances traveled to fish in order to prevent major declines in catch-per-unit-effort (CPUE). Charterboat operators argue that if declines in CPUE were to occur, they would rapidly lose business because few sport fishermen would pay a substantial fee for a fishing trip for groundfish unless there was a high probability of success. Commercial fishing vessels using hook-and-line jig gear also target on black rockfish in the Westport and Neah Bay areas. Data from the commercial jig fishery also suggest recent declines in availability of black rockfish in these areas. The commercial jig fishery had a gradual linear growth from 1983 to 1986, peaking in 1987 when landings were almost three times higher than 1986, then decreased through 1990 in the Westport and Neah Bay areas. Commercial jig landings in Westport decreased to less than 5,000 pounds (2.3 mt) in 1990 from a high of 173,500 pounds (78.7 mt) in 1987. These decreases contrast with the La Push area, located between the Neah Bay and Westport areas, where commercial jig fishery landings have increased since 1988.

The Council considered several alternatives to address the reduced availability of black rockfish to the recreational fishery and the need to prevent local depletion of black rockfish stocks from fishing pressure. All of the alternatives considered were intended to counteract the trend towards local depletion of black rockfish stocks by reducing fishing pressure by both the recreational and commercial fisheries. The alternatives also recognized the importance of these local areas to the recreational fishery and the relative inability of the recreational fishery, compared to the commercial fishery, to move to more distant areas of higher rockfish abundance. The alternatives considered included reductions in the recreational fishery bag limit for rockfish from 15 to 12 fish, and a variety of commercial fishing restrictions ranging from a complete ban on all commercial rockfish harvest in certain areas to a variety of trip landing limits designed to allow hook-and-line fishermen to land their incidental catch of black rockfish taken while fishing for other species. No reductions were proposed for the trawl fishery. These alternatives are described in more detail in the EA/RIR prepared by the Council in support of the proposed action.

According to the EA/RIR prepared by the Council, continuation of the status quo would result in a continuation of declining abundance and potential local depletion of black rockfish in the areas off Westport and Neah Bay, Washington. This decline could eventually lead to biological stress in black rockfish unless fishing pressure is reduced. Reductions in stocks of highly gregarious schooling fish such as black rockfish are more difficult to detect than reductions in stocks of more homogeneously distributed species. Fishing pressure could reduce the schools of black rockfish as fishing pressure shifts from school to school and measures of biological stress such as declines in length, age, and catch may not become apparent until harvests on the last schools occur. The EA/RIR does not specify how much the current harvest rate would have to be decreased to reduce or reverse the apparent decline in local availability of black rockfish in these areas. Black rockfish are slow growing and late maturing. Tagging studies by the Washington Department of Fisheries have demonstrated both migratory and residential behavior among black rockfish off Washington. The time frame for repopulation of areas where black rockfish abundance has been reduced would greatly depend on whether adults actively migrate to those areas from areas of higher abundance or whether recruitment occurs at earlier life stages. Restricting black rockfish harvests by the commercial hook-and-line fishery

will reduce removals of black rockfish in the Westport and Neah Bay areas to the extent that recreational vessels will take less than the reduction in commercial fishing that will result from these measures. Commercial vessels are expected to shift their operations into other areas sush as La Push where greater rockfish abundance occurs.

A review of the social and economic information in the EA/RIR indicates that reduced catches in the recreational black rockfish fishery would cause a loss of income to those coastal communities dependent on recreational fishing (Westport and Neah Bay). Reduction of the recreational rockfish bag limit to 12 fish would affect retention rates on about two-thirds of the charterboat trips that target on groundfish and would reduce the annual harvest by about 10 percent, if current fishing patterns remain constant. However, few private (i.e., not-for-hire) angler trips would be affected. The bag limit reductions may reduce the charterboat groundfish fishery, thereby affecting local economies in Westport and Neah Bay. However, the status quo or "no action" alternative will result in depletion of black rockfish stocks that also would be detrimental to the recreational fishery.

The commercial jig fishery that targets on black rockfish would be affected by the proposed restrictions. According to the EA/RIR, the commercial jig fishery appears to be a supplemental fishing activity and minor source of income for the majority of the commercial jig fishermen. A total of 208 and 189 vessels operated in the commercial jig fishery in 1989 and 1990 respectively. Of these, approximately 70 percent had no fishery income other than from jig fishing. However, the landings by these vessels have been less than 1,000 pounds per year over the past 4 years, and the annual income generated from jig fishing for these vessels averaged a little over $300, indicating their primary income was not from fishing. The commercial jig fishery appears to be a major source of income for only about nine vessels. The proposed restrictions may cause these vessels to shift their operation to the unrestricted are (La Push area) between Cape Alava and Destruction Island. Shifts in operating area could increase costs and could thereby affect the fish buyers in Westport and Neah Bay. However, these impacts are likely to occur anyway under the status quo if rockfish availability continues to decline. Some of the nine vessels have already shifted their operations to the La Push area due to better catch rates in this area.

Other commercial hook-and-line (longline and troll) fisheries that incidentally harvest black rockfish may also be affected by these proposed restrictions. The restrictions would not apply to trawl fisheries because black rockfish comprise a very small portion of trawl rockfish landings. NMFS expects that longline fisheries would not be affected by the restrictions because species composition sampling of longline rockfish catch in 1986, 1987, and 1988 found no black rockfish. The bottomfish troll, which targets on lingcod, and the salmon troll fisheries have an incidental harvest of black rockfish that varies annually, according to the EA/RIR and public testimony at the Council meeting. Salmon troll fishermen opposed restrictions on their fishery, since incidentally taken rockfish are usually dead when retrieved and the discards would negate any benefits to the resource that might derived from trip limits. The Council, however, was concerned about potential targeting on black rockfish and, after review of the EA/RIR, determined that a trip limit of 30 percent black rockfish by weight of the total fish onboard (including salmon) should minimize discards and impacts on the salmon troll fishermen.

Black rockfish also are harvested in coastal treaty Indian fisheries, which would be restricted by this proposal. Harvests of rockfish by the four coastal treaty Indian tribes have ranged from 18,000 pounds (8.2 mt) to 62,600 pounds (28.4 mt) over five years, with a recent 3-year average of 49,000 pounds (22.2 mt). Tribal harvests consist of year-round ceremonial, subsistence, and commercial fisheries. Rockfish is commercially harvested by tribal fishermen in a directed jig fishery and as incidental catch in longline, salmon troll, and marine set-net fisheries. For the coastal Indian tribal fisheries, the Council proposed three distinct management areas, and proposed 1991 rockfish harvest guidelines of 51,000 pounds north of Cape Alava and 10,000 pounds south of Destruction Island to Leadbetter Point. The area between Destruction Island and Cape Alava would have no rockfish harvest guideline. These areas coincide with the areas proposed for restrictions on the non-Indian fisheries, including the unrestricted area near La Push. Although the Council proposed the area boundaries be permanently established, it also intended that the harvest guideline amounts be established annually and revised as necessary through the framework process. The harvest guidelines are intended to promote perpetuation of the rockfish resource while providing the tribes continued opportunities to harvest rockfish stocks in the same areas as non-Indians. The harvest guidelines recommended for 1991 are based on past tribal harvest averages and are, therefore, unlikely to affect tribal fisheries.

Proposed Management Measures

The Council concluded that it is necessary to address the declining availability of black rockfish to the recreational fishery in the areas off Neah Bay and Westport. The Council found that fishing effort is not uniformly distributed along the Washington coast and that black rockfish abundance has remained relatively high in areas that have had low fishing pressure. The Council therefore found it necessary to restrict non-Indian fishing pressure in the Westport and Neah Bay areas to prevent further depletion of local black rockfish stocks in these areas and lessen the probability that biological stress will occur. Further, the Council recommended measures to separate the recreational and commercial jig fisheries that target on black rockfish in these areas to reduce conflicts between users in accessing fishing grounds and to reduce fishing effort. This is discussed more specifically in the EA/RIR. The Council chose to restrict targeting by commercial jig vessels in these areas because these vessels can more easily shift their operations to areas of higher rockfish abundance, mainly the La Push area. The proposed commercial trip limit would not apply to the La Push area, thereby encouraging commercial jig vessels that target on black rockfish to shift their fishing operation to this unrestricted black rockfish harvest area (unrestricted except for *Sebastes* complex trip limits). The recreational fishery is less able to move to the La Push area because it would put them outside their economic operating range. The Council also was concerned about potential targeting on black rockfish in the Westport and Neah Bay areas by other commercial hook-and-line (longline and troll) fisheries. Therefore, the Council determined that a 100-pound trip limit on black rockfish or 30 percent by weight of the total fish (including salmon) onboard would prevent targeting by these hook-and-line fisheries and discourage fishing in areas of black rockfish aggregations while allowing retention of small amounts of incidental catches to prevent wasteful discards. The Council attempted to balance the impact and conservation burden on all user groups that harvest black rockfish and to focus specifically

on black rockfish as opposed to other species. Thus, the commercial hook-and-line trip limit applies to black rockfish only; the *Sebastes* complex trip limit is unaffected.

For the recreational fishery, however, the reduction in bag limit applies to all rockfish. The Council took this approach with the recreational fishery because most of the rockfish caught off Washington are black rockfish and the Council wanted to avoid complicated regulations. In addition, a reduced overall rockfish bag limit will prevent recreational fishing effort from shifting to other rockfish species which may be less able to sustain additional fishing effort. This action would apply to all user groups including the coastal treaty Indian fishermen.

The Council adopted tribal recommendations to establish annual harvest guidelines on all species of rockfish for coastal treaty Indian commercial fishermen in the Westport and Neah Bay areas with a specific harvest guideline for 1991. The Council adopted the tribes' recommendation, rather than applying harvest guidelines to just black rockfish, because of lack of specific harvest data and biomass estimates on black rockfish off Washington. The coastal treaty Indian tribes advised the Council that they would focus their port sampling efforts on determining the species composition of tribal rockfish landings and collect additional information to further define the fishery characteristics of the tribal rockfish effort. In summary, the Council determined that the proposed action distributes the reduced fishing burden among all user groups and causes the least disruption of current fishing practices.

In accordance with the socio-economic framework process, the NMFS Regional Director reviewed the Council's recommendations, supporting rationale, applicable documents, and public comments. The Regional Director determined that the Council's proposed management measures are sufficiently consistent with the goals and objectives of the FMP to warrant publication in this proposed rule. To enhance enforcement of the proposed trip limits on black rockfish, NMFS has supplemented the Council's proposed measures to include a retention or possession limit, in addition to the landing limit, for commercial hook-and-line vessels operating in the Westport and Neah Bay areas. Because a vessel could fish in the areas with proposed black rockfish trip limits as well as in areas without limits during the same trip, the possession limit is proposed to enhance enforcement of the restrictions on black rockfish harvests in the Westport and Neah Bay areas. Therefore, NMFS requests public comments on the following:

1. A reduction in the daily bag limit of 15 rockfish, set forth in the annual management measures (56 FR 645; January 8, 1991), to 12 rockfish for the recreational fishery in the area between the U.S./Canada border and Leadbetter Point (46°38'10" N. latitude).

2. A black rockfish (*Seabastes melanops*) trip limit of 100 pounds or 30 percent of total round weight of all fish landed (including salmon), whichever is greater, for non-Indian commercial vessels using hook-and-line gear in the area from the U.S./Canada border to Cape Alava (48°09'30" N. latitude) and from Destruction Island (47°40'00" N. latitude) to Leadbetter Point (46°38'10" N. latitude).

3. A black rockfish retention limit of 100 pounds or 30 percent of total round weight of all fish on board (including salmon), whichever is greater, for non-Indian commercial hook-and-line vessels fishing in the area from the U.S./Canada border to Cape Alava (48°09'30" N. latitude) and from Destruction Island (47°40'00" N. latitude) to Leadbetter Point (46°39'10" N. latitude).

4. A 1991 harvest guideline for coastal treaty Indian (the Makah, Quileute, Hoh, and Quinault Indian tribes) commercial harvests of all species of rockfish of 51,000 pounds (23.1 mt) between the U.S./Canada border and Cape Alava (48°09'30" N. latitude) and 10,000 pounds (4.5 mt) between Destruction Island (47°40'00" N. latitude) and Leadbetter Point (46°38'10" N. latitude). Tribal ceremonial and subsistence fisheries will not be restricted. Such harvest guidelines annually would be set, reviewed, and adjusted as necessary under procedures for developing and implementing annual fishing specifications and apportionments in section II.H. of the appendix to 50 CFR part 663.

The proposed reduction in the rockfish bag limit could be implemented by a single final rule ("abbreviated rulemaking") because it is classified as a "routine" management measure under 50 CFR 663.23(c)(2)(i)(B). All of the remainder of the proposed management measures included in this rule require modification of the regulations by proposed and final (i.e., "full") rulemaking. According to the abbreviated rulemaking provisions of the FMP (as set forth in section III.B.3 of the appendix to 50 CFR part 663), NOAA has chosen to include the bag limit reduction in this "full" rulemaking in order to implement the Council's recommendations as a complete package.

Classification

This proposed rule is published under authority of section 305(d) of the Magnuson Act, 16 U.S.C. 1855(d), and was prepared at the request of the Council. The Assistant Administrator for Fisheries, NOAA (Assistant Administrator), has preliminarily determined that the measures in this proposed rule are necessary for the conservation and management of the Pacific coast groundfish fishery and tha they are consistent with the Magnuson Act and other applicable law. The Assistant Administrator, before publishing a final rule, will take into account the data and comments received during the comment period.

Based on the EA/RIR, the Council initially concluded that there will be no significant impact on the environment, within the meaning of section 102(2)(c) of the National Environmental Policy Act, as a result of this rule. After the comment period has concluded, the Assistant Administrator will make the final determination about the impact of this rule on the human environment. Copies of the EA/RIR are available upon request (see **ADDRESSES**).

The Assistant Administrator has determined that this is not a major rule requiring a regulatory impact analysis under Executive Order 12291. This determination is based on the analysis in the EA/RIR that indicates that the proposed action will not have a cumulative effect on the economy of $100 million or more, nor will it result in a major increase in costs to consumers, industries, government agencies, or geographical regions. No significant adverse impacts are anticipated on competition, employment, investments, productivity, innovation, or competitiveness of U.S.-based enterprises.

The General Counsel of the Department of Commerce certified to the Small Business Administration that this proposed rule, if approved, will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq*. This conclusion is based on the analysis contained in the EA/RIR, which indicates that although a substantial number of vessels that fish off the Washington coast may be affected by this action, the resulting

decrease in the annual gross income of the majority of these vessels due to this proposed action is insignificant.

This proposed rule does not contain a collection-of-information requirement for purposes of the Paperwork Reduction Act, 44 U.S.C. 3501 *et. seq.*

The Northwest Regional Director has initially determined that this proposed rule is consistent to the maximum extent practicable with applicable state coastal zone management program as required. This initial determination has been submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act.

This rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under Executive Order 12612.

List of Subjects in 50 CFR Part 663

Administrative practice and procedure, Fisheries, Fishing, Indians, Recordkeeping and reporting requirements.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: September 13, 1991.

Samuel W. McKeen,

Acting Assistant Administrator for Fisheries, National Marine Fisheries Service.

For the reasons set forth in the preamble, 50 CFR part 663 is proposed to be amended as follows:

PART 663—PACIFIC COAST GROUNDFISH FISHERY

1. The authority citation for part 663 continues to read as follows:

Authority: 16 U.S.C. 1801 *et seq.*

2. In § 663.23, paragraph (b)(1) is revised to read as follows:

§ 663.23 Catch Restrictions. * * *

* * * * *

(b) *Commercial fishing*—(1) *Rockfish.* (i) The trip limit for a vessel engaged in fishing with a pelagic trawl with mesh size less than 4.5 inches in the Conception or Monterey subareas is 500 pounds or 5 percent by weight of all fish on board, whichever is greater, of the species group composed of bocaccio, chilipepper, splitnose, and yellowtail rockfish per fishing trip.

(ii) A harvest guideline for commercial harvests of all species of rockfish by members of the Makah, Quileute, Hoh, and Quinault Indian tribes will be established annually for the area between the U.S./Canada border and Cape Alava (48°09'30" N. latitude) and the area between Destruction Island (47°40'00" N. latitude) and Leadbetter Point (46°38'10" N. latitude) in accordance with the procedures in section II.H of the appendix to this part.

(iii) *Black rockfish.* (A) The trip limit for black rockfish (*Sebastes melanops*) for commercial fishing vessels using hook-and-line gear in the area from the U.S./Canada border to Cape Alava (48°09'30" N. latitude) and from Destruction Island (47°40'00" N. latitude) to Leadbetter Point (46°38'10" N. latitude) is 100 pounds or 30 percent by weight of all fish on board, whichever is greater, per vessel per fishing trip. This trip limit does not apply to coastal treaty Indian fishermen operating under paragraph (b)(1)(ii) of this section.

(B) Commercial hook-and-line fishing vessels, other than those operating under paragraph (b)(1)(ii) of this section, shall not have more than 100 pounds or 30 percent by weight of all fish on board, whichever is greater, of black rockfish while that vessel is fishing in the area from the U.S./Canada border to Cape Alava (48°09'30" N. latitude) and from Destruction Island (47°40'00" N. latitude) to Leadbetter Point (46°38'10" N. latitude).

* * * * *

Appendix to Part 663 [Amended]

3. In the appendix to part 663—Groundfish Management Procedures, section II.H., add the following sentence at the end of the first paragraph.

"The Council also will develop recommendations for the specification of commercial harvest guidelines for rockfish harvests by members of the Makah, Quileute, Hoh, and Quinault Indian tribes specified in 663.23(b)(1)(ii)."

[FR Doc. 91–22614 Filed 9–16–91; 1:54 pm]

BILLING CODE 3510–22–M

Notices

Federal Register
Vol. 56, No. 182
Thursday, September 19, 1991

This section of the FEDERAL REGISTER contains documents other than rules or proposed rules that are applicable to the public. Notices of hearings and investigations, committee meetings, agency decisions and rulings, delegations of authority, filing of petitions and applications and agency statements of organization and functions are examples of documents appearing in this section.

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

Committee on Rulemaking; Public Meetings

Pursuant to the Federal Advisory Committee Act (Pub. L. No. 92–463), notice is hereby given of the meetings of the Committee on Rulemaking of the Administrative Conference of the United States.

Committee on Rulemaking

Date: Friday, September 27, 1991.
Time: 9 a.m.
Location: Administrative Conference of the United States, 2120 L Street, NW., suite 500, Washington, DC 20037 (Library, 5th Floor).
Agenda: The committee will meet to discuss: (1) The procedural rule exemption of the Administrative Procedure Act; and (2) Professor Robert Anthony's study of non-rule rulemaking.
Contact: Kevin Jessar, 202–254–7020.

Committee on Rulemaking

Date: Monday, October 21, 1991.
Time: 1:30 p.m.
Location: Administrative Conference of the United States, 2120 L Street, NW., suite 500, Washington, DC 20037 (Library, 5th Floor).
Agenda: The committee will meet to discuss Professor Robert Anthony's study of non-rule rulemaking.
Contact: Kevin Jessar, 202–254–7020.

Attendance at the committee meetings is open to the interested public, but limited to the space available. Persons wishing to attend should notify the Office of the Chairman at least one day in advance. The committee chairman, if he deems it appropriate, may permit members of the public to present oral statements at the meeting. Any member of the public may file a written statement with the committee before, during, or after the meeting. Minutes of the meetings will be available on request. The contact persons' mailing address is: Administrative Conference of the United States, 2120 L Street, NW., suite 500, Washington, DC 20037. Telephone: 202–254–7020.

Dated: September 9, 1991
Jeffrey S. Lubbers,
Research Director.
[FR Doc. 91–22530 Filed 9–18–91; 8:45 am]
BILLING CODE 6110–01–M

AGENCY FOR INTERNATIONAL DEVELOPMENT

Public Information Collection Requirements Submitted to OMB for Review

The Agency for International Development (AID) submitted the following public information collection requirements to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96–511. Comments regarding these information collections should be addressed to the OMB reviewer listed at the end of the entry. Comments may also be addressed to, and copies of the submissions obtained from the Reports Management Officer, Fred D. Allen (703) 875–1573, MS/AS/ISS, room 1209B, SA–14, Washington, DC 20523–1413.

Date Submitted: September 5, 1991.
Submitting Agency: Agency for International Development.
OMB Number: None.
Form Number: None.
Type of Submission: New Collection.
Title: Information on Source and Nationality.
Purpose: Congress has requested AID to provide information on the amount of AID program funds which are spent for U.S. goods and services. Because of the various different types of programs that AID finances as well as different requirements for reporting, AID has been able to provide information only with considerable time and expense. The Agency is establishing a new system to collect information on source of goods and services from all entities receiving AID funds, whether under direct AID agreements or AID-financed agreements with recipient countries.

Annual Reporting Burden

Respondents: 3,275; annual responses: 15.9; average hours per response: 4; burden hours: 208,000.

Reviewer: Marshall Mills (202) 395–7340, Office of Management and Budget, room 3201, New Executive Office Building, Washington, DC 20503.

Dated: September 9, 1991.
Elizabeth Baltimore,
Communications and Program Management Division.
[FR Doc. 91–22516 Filed 9–18–91; 8:45 am]
BILLING CODE 6116–01–M

Public Information Collection Requirements Submitted to OMB for Review

The Agency for International Development (A.I.D.) submitted the following public information collection requirements to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96–511. Comments regarding these information collections should be addressed to the OMB reviewer listed at the end of the entry no later than ten days after publication. Comments may also be addressed to, and copies of the submission obtained from the Reports Management Officer, Fred D. Allen, (703) 875–1573, MS/AS/ISS, room 1209B, SA–14, Washington, DC 20523–1413.

Date Submitted: September 11, 1991.
Submitting Agency: Agency for International Development.
OMB Number: 0412–0520.
Type of Submission: Extension.
Title: Information Collection Elements in the A.I.D. Acquisition Regulation (AIDAR).
Purpose: A.I.D. is authorized to make contracts with any corporation, international organization, or other body of persons whether within or without the United States in furtherance of the purposes and within the limitations of the Foreign Assistance Act (FAA). Information collections and recordkeeping requirements placed on the public by the A.I.D. Acquisition Regulation (AIDAR), are published as 48 CFR 7. These are all A.I.D. unique procurement requirements which have not otherwise been submitted to OMB for approval. The preaward requirements are based on a need for prudent management in the determination that an offeror either has or can obtain the ability to competently manage development assistance programs utilizing public funds. The requirements for information during the

post-award period are based on the need to administer public funds prudently.

Annual Reporting Burden

Respondents: 1,450; annual responses: 28; average hours per response: 4.6; burden hours: 188,303.

Reviewer: Lin Liu (202) 395–7340, Office of Management and Budget, room 3201, New Executive Office Building, Washington, DC 20503.

Dated: September 9, 1991.

Elizabeth Baltimore,

Communications and Program Management Division.

[FR Doc. 91–22517 Filed 9–18–91; 8:45 am]

BILLING CODE 6116–01–M

DEPARTMENT OF AGRICULTURE

Forms Under Review by Office of Management and Budget

September 13, 1991.

The Department of Agriculture has submitted to OMB for review the following proposals for the collection of information under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35) since the last list was published. This list is grouped into new proposals, revisions, extensions, or reinstatements. Each entry contains the following information:

(1) Agency proposing the information collection; (2) Title of the information collection; (3) Form number(s), if applicable; (4) How often the information is requested; (5) Who will be required or asked to report; (6) An estimate of the number of responses; (7) An estimate of the total number of hours needed to provide the information; (8) Name and telephone number of the agency contact person.

Questions about the items in the listing should be directed to the agency person named at the end of each entry. Copies of the proposed forms and supporting documents may be obtained from: Department Clearance Officer, USDA, OIRM, room 404–W Admin. Bldg., Washington, DC 20250, (202) 447–2118.

Revision

• Farmers Home Administration
7 CFR 1956–C, Debt Settlement—Community and Business Progams—Addendum 1
On occasion
Individuals or households; State or local governments; Businesses or other for-profit; Non-profit institutions; Small businesses or organizations; 37 responses; 439 hours
Jack Holston (202) 382–9736

Extension

• Agricultural Stabilization and Conservation Service
7 CFR part 719, Reconstitution of Farms Allotments, Normal Crop Acreage and Proceeding Year Planted Acreage
ASCS–155
On occasion
Individuals or households; Farms; 900,000 responses; 375,000 hours
Jane Salem (202) 447–7635

• Forest Service
Supplemental Information to Support Determination of Term Length for Special Use Permit Issued Under Authority of the National Forest Ski Area Permit Act of 1986
On occasion
Businesses or other for-profit; 5 responses; 600 hours
John Shilling (202) 205–1426

• Foreign Agricultural Service
Buyer Alert Notice
FAS 964
On occasion
Businesses or other for-profit; 5,000 responses; 850 hours
David Salmon (202) 447–7103

• National Agricultural Statistics Service
Cotton Ginnings Survey
Semi-annually; Annually; Semi-monthly Sept.–Jan.
Businesses or other for-profit; Small businesses or organizations; 1,580 responses; 1,151 hours
Larry Gambrell (202) 447–7737

• Agricultural Marketing Service
Oregon—Washington—California Winter Pears—Marketing Order No. 927
On occasion
Farms; Businesses or other for-profit; 5556 responses; 3,595 hours
Patrick Packnett (202) 475–3862

• Agricultural Marketing Service
California Pears and Peaches—Marketing Order No. 917
On occasion; Semi-annually
Farms; Businesses or other for-profit; Small businesses or organizations; 1,511 responses; 1,239 hours
Tim Tichenor (202) 475–5464

• Agricultural Marketing Service
Avocados Grown in South Florida—M.O. 915
On occasion; Weekly
Farms; Businesses or other for-profit; Small businesses or organizations; 900 responses; 90 hours
Marty Freeman or Gary Rasmussen (202) 447–5975

• Agricultural Marketing Service
Lemons Grown in California and Arizona—Marketing Order No. 910
Recordkeeping; On occasion; Weekly; Annually
Farms; Businesses or other for-profit; 69,233 responses; 11,814 hours
Sonia N. Jimenez (202) 475–5992

New Collection

• Agricultural Stabilization and Conservation Service
7 CFR part 1435, Regulations Governing Sugar and Crystalline Furtose Information Reporting Requirements
CCC–831, 832, 833, 834, 835
Recordkeeping; Monthly
Businesses or other for-profit; 1,500 responses; 31,242 hours
Bob Barry (202) 447–3391

• Forest Service
Employment Interest Survey
R–5–6100–135
On occasion
Individuals or households; 10,000 responses; 2,500 hours
Floyd Thomas (415) 705–2924

• Rural Electrification Administration
Pre- and Post-Loan Policies and Procedures for Guaranteed Electric and Telephone Loans—Addendum 1
On occasion; Quarterly
Small Businesses or organizations; 22 responses; 75 hours
Daphne L. Brown (202) 382–9551

• Farmers Home Administration
7 CFR 1948–E, Loans to Economically Disadvantaged Rural Communities
Recordkeeping; On occasion
Individuals or households; State or local governments; Small businesses or organizations; 1,268 responses; 1,040 hours
Jack Holston (202) 382–9736

• Farmers Home Administration
7 CFR 1927–B, Real Estate Title Clearance and Loan Closing
FmHA 1927–3, –5, –8, –9, –10, –11, –12, –15, –16, –19, –20
On occasion
Individuals or households; Businesses or other for-profit; Small businesses or organizations; 481,550 responses; 183,694 hours
Jack Holston (202) 382–9736

• Food and Nutrition Service
Evaluation of Dietary Guidance Graphic Alternatives
One-time only
Individuals or households; State or local governments; 3,413 responses; 1,304 hours
Ann Chadwick (202) 447–3975

Reinstatement

• Farmers Home Administration
7 CFR 2054–W, Employment, Pay and Functions of County and/or Area Committees
FmHa 2054–5
On occasion

Individuals or households; Farms; 7,600 responses; 2,850 hours
Jack Holston (202) 382–9736
• Farmers Home Administration
7 CFR 1943–B, Insured Soil and Water Loan Policies, Procedures, and Authorizations
On occasion
Farms; Businesses or other for-profit; Small businesses or organizations; 255 responses; 102 hours
Jack Holston (202) 382–9736
• Farmers Home Administration
7 CFR 1944–N, Housing Preservation Grant Program
On occasion; Quarterly
Individuals or households; State or local governments; Businesses or other for-profit; Non-profit institutions; 8,100 responses; 11,065 hours
Jack Holston (202) 382–9736
• Farmers Home Administration
7 CFR 1910–A, Receiving and Processing Applications
On occasion
Individuals or households; Farms; Businesses or other for-profit; 94,800 responses; 71,855 hours
Jack Holston (202) 382–9736

Robert W. Whiting,
Deputy Departmental Clearance Officer.

[FR Doc. 91–22562 Filed 9–18–91; 8:45 am]

BILLING CODE 3410-01-M

Farmers Home Administration

Approval of Information Collection by OMB (Under Paperwork Reduction Act and 5 CFR Part 1320)

AGENCY: Farmers Home Administration, USDA.

ACTION: Notice.

SUMMARY: A revision to subpart J of part 1942 was published in the **Federal Register** on July 11, 1991, volume 56, page 31535. The information collection requirement described below was published without prior approval of OMB. This action is public notification that on August 8, 1991 the reporting requirements contained in this regulation were approved by the Office of Management and Budget and assigned OMB control number 0575–0123. Public reporting burden for this collection of information is estimated to vary from 15 minutes to 4 hours per response, with an average of 1 hour per response including time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information.

ADDRESSES: Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to Department of Agriculture, Clearance Officer, OIRM, room 404–W, Washington, DC 20250; and to the Office of Management and Budget, Paperwork Reduction Project (OMB #0575–0123), Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Jack Holston, Senior Management Analyst, General Services Staff, Farmers Home Administration, room 6855 South Building, USDA, Washington, DC 20250. Telephone (202) 382–9736.

Dated: September 13, 1991.

LaVerne Ausman,
Administrator, Farmers Home Administration.

[FR Doc. 91–22609 Filed 9–18–91; 8:45 am]

BILLING CODE 3410-07-M

Forest Service

Oil and Gas Leasing Analysis, White River National Forest; Eagle, Garfield, Gunnison, Mesa, Moffat, Pitkin, Rio Blanco, Routt, and Summit Counties, CO

AGENCY: Forest Service, USDA.

ACTION: Notice; intent to prepare an environmental impact statement.

SUMMARY: The U.S. Department of Agriculture, Forest Service will prepare an environmental impact statement to disclose effects of alternative decisions it may make to lease lands of the White River National Forest including the Dillon Ranger District of the Arapaho National Forest for oil and gas exploration and development.

DATES: Written comments concerning the scope of the analysis should be received on or before November 15, 1991.

ADDRESSES: Send written comments to Thomas A. Hoots, Forest Supervisor, White River National Forest, P.O. Box 948, 9th and Grand Ave., Glenwood Springs, Colorado 81602.

FOR FURTHER INFORMATION CONTACT: Meg Lindsey, EIS Coordinator, White River National Forest, P.O. Box 948, 9th and Grand Ave., Glenwood Springs, Colorado 81602, (303) 945–2521.

SUPPLEMENTARY INFORMATION: The Forest Supervisor will identify which lands will be administratively available for leasing to private individuals or firms and the stipulations that must be applied to their portion of the "administratively available" lands in the Record of Decision that will accompany the final environmental impact statement (EIS).

The legal need for doing an EIS is to comply with the Federal Onshore Oil and Gas Leasing Reform Act of 1987 and Forest Service implementing regulations 36 CFR Part 228. The 1987 Leasing Reform Act made two significant changes in the way leasing decisions are reached. First, the Act expanded the role of the Secretary of Agriculture in the leasing decision process. The Secretary was authorized to identify the National Forest System lands for which leases could be sold. Also, he or his officers were authorized to determine the appropriate stipulations to apply to a lease to protect the surface resources. Second, the Act established a statutory requirement for processing the Surface Use Plan of Operations prior to ground-disturbing activities. This established a staged decision process for sale of a lease and approval of an application for permit to drill.

The leasing decisions will result in an amendment to the White River National Forest Land and Resource Management Plan (Forest Plan).

As part of the scoping process the Forest will meet with environmental groups, oil and gas industry, other agencies, individuals, etc. If necessary, open houses and/or public meetings will be held.

Preliminary issues which have been identified are: adverse effects of oil and gas leasing activities on wetlands, floodplains, water quality, cultural resources, caves, wildlife, visual quality, air quality, solitude, soils, vegetation, and federally listed candidate and threatened and endangered plant and animal species; adverse effects on transportation systems; transportation and disposal of hazardous materials; effects of oil and gas development in "roadless areas"; conflicts between oil and gas development and forest recreation users; effects of oil and gas activities resulting in forest fragmentation; effects of drilling on surface and groundwater supplies, erosion and run-off, streambank stabilization and potable water; water depletion from oil and gas development in the upper Colorado River basin relative to requirements under the Endangered Species Act for the four big river fishes; effects of oil and gas non-development/development on the local economy; and effects of oil and gas activities on local housing, employment, law enforcement, schools, and hospitals.

Preliminary alternatives which have been identified are: (1) No Action or Current Management—Continue leasing using standards and guidelines of the Forest Plan in which leasing decisions will be made on a lease-by-lease basis, (2) NFS Lands Available for Lease with Standard Lease Terms Only, (3) NFS

Lands Available with Standard Lease Terms Only and NFS Lands Available with Special Stipulations in Addition to Standard Lease Terms, and (4) No NFS Lands Available for Leasing—existing leases which are not extended by production will be allowed to expire.

The USDA Forest Service is the lead agency, and the Bureau of Land Management is a Cooperating Agency.

The Forest Service will seek comments on the draft environmental impact statement (DEIS) for a period of 45 days after publication of the DEIS. The Forest Service will summarize and respond to the comments in the final EIS.

The responsible official is Thomas A. Hoots, White River National Forest Supervisor.

To assist the Forest Service in identifying and considering issues and concerns on the proposed action, comments on the DEIS should be as specific as possible. It is also helpful if comments refer to specific pages or chapters of the draft statement. Comments may also address the adequacy of the DEIS or the merits of the alternatives formulated and discussed in the statement. (Reviewers may wish to refer to the Council on Environmental Quality Regulations for implementing the prodedural provisions of the National Environmental Policy Act at 40 CFR 1503.3 in addressing these points.)

The Forest Service believes it is important to give reviewers notice at this early stage of several court rulings related to public participation in the environmental review process. First, reviewers of DEIS's must structure their participation in the environmental review of the proposal so that it is meaningful and alerts an agency to the reviewer's position and contentions. *Vermont Yankee Nuclear Power Corp.* v. *NRDC, 435 U.S. 519, 553 (1978).* Also, environmental objections that could be raised at the DEIS stage but that are not raised until after completion of the final EIS may be waived or dismissed by the courts. *Wisconsin Heritages, Inc.* v. *Harris*, 490 F. Supp. 1334, 1338 (E.D. Wis. 1980).

Because of these court rulings, it is very important that those interested in this proposed action participate by the close of the 45 day comment period so that substantive comments and objections are made available to the Forest Service at a time when it can meaningfully consider them and respond to them in the final EIS.

The estimated date for filing the DEIS is March, 1992. The final EIS will be filed by September 30, 1992.

Dated September 6, 1991.

Thomas A. Hoots,

Forest Supervisor.

[FR Doc. 91-22528 Filed 9-18-19; 8:45 am]

BILLING CODE 3410-11-M

Soil Conservation Service

Deans Creek Critical Area Treatment RC&D Measure, NY; Finding of No Significant Impact

AGENCY: Soil Conservation Service, USDA.

ACTION: Notice of a finding of no significant impact.

SUMMARY: Pursuant to section 102(2)(c) of the National Environmental Policy Act of 1969; the Council on Environmental Quality Guidelines (40 CFR part 1500); and the Soil Conservation Service Guidelines (7 CFR part 650); the Soil Conservation Service, U.S. Department of Agriculture, gives notice that an environmental impact statement is not being prepared for the Deans Creek Critical Area Treatment, Oneida County, New York.

FOR FURTHER INFORMATION CONTACT: Paul A. Dodd, State Conservationist, Soil Conservation Service, James M. Hanley Federal Building, 100 S. Clinton Street, room 771, Syracuse, New York 13261-7248, telephone (315) 423-5521.

SUPPLEMENTARY INFORMATION: The environmental assessment of this federally assisted action indicates that the project will not cause significant local, regional, or national impacts on the environment. As a result of these findings, Paul A. Dodd, State Conservationist, has determined that the preparation of an environmental impact statement is not needed for this project.

This measure concerns a plan to provide for the stabilization of the eroding north streambank along and adjacent to the bridge wingwall on Deans Highway. Continued erosion of the streambank will jeopardize the integrity of the bridge, creating a severe safety hazard to users of the highway. Disposition immediately downstream from the bridge occupies the middle of the stream and deflects flows toward both banks, creating an erosive situation in this area and impairing the water quality.

The integrity of the bridge will be assured through the installation of the project measures. The planned works of improvement include approximately 188 linear feet of riprap and bedding, and approximately 1 acre of seeding and mulching. Benefits will be derived through the elimination of the safety hazard improvement of water quality, and the reduction of annual cost of maintenance.

The Notice of Finding of No Significant Impact (FONSI) has been forwarded to the Environmental Protection Agency and to various federal, state, and local agencies and interested parties. A limited number of copies of the FONSI are available to fill single copy requests at the above address. Basic data developed during the environmental assessment is on file and may be reviewed by contacting Paul A. Dodd. No administrative action on implementation of the proposal will be taken until 30 days after the date of this publication in the **Federal Register.**

(This activity is listed in the Catalog of Federal Domestic Assistance under No. 10.901—Resource Conservation and Development—and is subject to the provision of Executive Order 12372 which requires intergovernmental consultation with state and local officials.)

Paul A. Dodd,

State Conservationist.

[FR Doc. 91-22593 Filed 9-18-91; 8:45 am]

BILLING CODE 3410-16-M

Larkin Creek Watershed, Arkansas; Deauthorization of Federal Funding

AGENCY: Soil Conservation Service, USDA.

ACTION: Notice of deauthorization of federal funding.

SUMMARY: Pursuant to the Watershed Protection and Flood Prevention Act, Public Law 83-566, and the Soil Conservation Service Guidelines (7 CFR part 622), the Soil Conservation Service gives Notice of the Deauthorization of Federal Funding for the Larkin Creek Watershed project, Lee and St. Francis Counties, Arkansas, effective on August 13, 1991.

FOR FURTHER INFORMATION CONTACT: Ronnie D. Murphy, State Conservationist, Soil Conservation Service, Room 5404, Federal Office Building, 700 West Capitol Avenue, Little Rock, Arkansas 72201, (501) 324-5445.

(Catalog of Federal Domestic Assistance Program No. 10.904, Watershed Protection and Flood Prevention. Office of Management and Budget Circular No. A-95 regarding State and local clearinghouse review of Federal and federally assisted programs and projects is applicable)

Dated: September 9, 1991.

Ronnie D. Murphy,

State Conservationist.

[FR Doc. 91-22594 Filed 9-18-91; 8:45 am]

BILLING CODE 3410-16-M

Lower Tri-County Watershed, Arkansas; Deauthorization of Federal Funding

AGENCY: Soil Conservation Service, USDA.

ACTION: Notice of deauthorization of federal funding.

SUMMARY: Pursuant to the Watershed Protection and Flood Prevention Act, Public Law 83–566, and the Soil Conservation Service Guidelines (7 CFR part 622), the Soil Conservation Service gives Notice of the Deauthorization of Federal Funding for the Lower Tri-County Watershed project, Independence, Lawrence, and Sharp Counties, Arkansas, effective on August 13, 1991.

FOR FURTHER INFORMATION CONTACT: Ronnie D. Murphy, State Conservationist, Soil Conservation Service, Room 5404, Federal Office Building, 700 West Capitol Avenue, Little Rock, Arkansas 72201, (501) 324–5445.

(Catalog of Federal Domestic Assistance Program No. 10.904, Watershed Protection and Flood Prevention. Office of Management and Budget Circular No. A–95 regarding State and local clearinghouse review of Federal and federally assisted programs and projects is applicable.)

Dated: September 9, 1991.

Ronnie D. Murphy,

State Conservationist.

[FR Doc. 91–22595 Filed 9–18–91; 8:45 am]

BILLING CODE 3410-16-M

DEPARTMENT OF COMMERCE

International Trade Administration

Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation; Opportunity To Request Administrative Review

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of Opportunity to Request Administrative Review of Antidumping or Countervailing Duty Order, Finding, or Suspended Investigation.

Background: Each year during the anniversary month of the publication of an antidumping or countervailing duty order, finding, or suspension of investigation, an interested party as defined in section 771(9) of the Tariff Act of 1930 may request, in accordance with § 353.22 or § 355.22 of the Commerce Regulations, that the Department of Commerce ("the Department") conduct an administrative review of that antidumping or countervailing duty order, finding, or suspended investigation.

Opportunity To Request a Review

Not later than September 30, 1991, interested parties may request administrative review of the following orders, findings, or suspended investigations, with anniversary dates in September for the following periods:

	Period
Antidumping Duty Proceedings:	
Canada: Replacement Parts for Self-Propelled Bituminous Paving Equipment, (A-122-057)	09/01/90-08/31/91
Canada: Steel Jacks, (A-122-006)	09/01/90-08/31/91
Canada: Steel Rails, (A-122-804)	09/01/90-08/31/91
Hong Kong: Sweaters of Man-Made Fibers, (A-582-802)	04/27/90-08/31/91
Italy: Pads for Woodwind Instrument Keys, (A-475-017)	09/01/90-08/31/91
Japan: Filament Fabric, (A-588-607)	09/01/90-08/31/91
Korea: Sweaters of Man-Made Fibers, (A-580-806)	04/27/90-08/31/91
Taiwan: Sweaters of Man-Made Fibers (A-583-808)	04/27/90-08/31/91
The Federal Republic of Germany: Certain Forged Steel Crankshafts, (A-428-604)	09/01/90-08/31/91
The People's Republic of China: Greige Polyester/Cotton Printcloth, (A-570-101)	09/01/90-08/31/91
The United Kingdom: Certain Forged Steel Crankshafts, (A-412-602)	09/01/90-08/31/91
Suspension Agreements:	
Argentina: Certain Carbon Steel Wire Rod, (C-357-004)	01/01/90-12/31/90
Peru: Cotton Shop Towels, (C-333-401)	01/01/90-12/31/90
Countervailing Duty Proceedings:	
Argentina: Certain Welded-Carbon Steel Pipe and Tube Products, (C-357-801)	01/01/90-12/31/90
Canada: New Steel Rail, Except Light Rail, (C-122-805)	01/01/90-12/31/90
Israel: Fresh Cut Roses, (C-508-064)	10/01/89-09/30/90
New Zealand: Lamb Meat, (C-614-503)	04/01/90-03/31/91
New Zealand: Steel Wire, (C-614-601)	07/01/90-06/30/91

In accordance with § 353.22(a) of the Commerce regulations, an interested party may request in writing that the Secretary conduct an administrative review of specified individual producers or resellers covered by an order, if the requesting person states why the person desires the Secretary to review those particular producers or resellers. If the interested party intends for the Secretary to review sales of merchandise by a reseller (or a producer if that producer also resells merchandise from other suppliers) which was produced in more than one country of origin, and each country of origin is subject to a separate order, then the interested party must state specifically which reseller(s) and which countries of origin for each reseller the request is intended to cover.

Seven copies of the request should be submitted to the Assistant Secretary for Import Administration, International Trade Administration, room B–099, U.S. Department of Commerce, Washington, DC 20230. Further, in accordance with § 353.31 of the Commerce Regulations, a copy of each request must be served on every party on the Department's service list.

The Department will publish in the **Federal Register** a notice of "Initiation of Antidumping (Countervailing) Duty Administrative Review", for requests received by September 30, 1991.

If the Department does not receive by September 30, 1991 a request for review of entries covered by an order or finding listed in this notice and for the period identified above, the Department will instruct the Customs Service to assess antidumping or countervailing duties on those entries at a rate equal to the cash deposit of (or bond for) estimated antidumping or countervailing duties required on those entries at the time of entry, or withdrawal from warehouse, for consumption and to continue to collect the cash deposit previously ordered.

This notice is not required by statute, but is published as a service to the international trading community.

Dated: August 19, 1991.

Joseph A. Spetrini,

Deputy Assistant Secretary for Compliance.

[FR Doc. 91-22635 Filed 9-18-91; 8:45 am]

BILLING CODE 3510-05-M

[A-301-602]

Certain Fresh Cut Flowers From Colombia; Correction of Final Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration/Import Administration Department of Commerce.

ACTION: Correction to the notice of final results of antidumping duty administrative review.

CORRECTION: On July 15, 1991 (56 FR 32169), the Department of Commerce published the final results of its administrative review of the antidumping duty order on certain fresh cut flowers from Colombia. On page 32172 of that notice, the first sentence of the Department's Position in response to comment 8 should read: "Although the final results of this review and those of the second administrative review indicate sales of not less than fair value for a period of 28 months, the final determination of the original fair value investigation indicates a greater than *de minimis* margin for the group." The words "greater than" were inadvertently omitted in the notice.

This administrative review and correction notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated: September 13, 1991.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 91-22632 Filed 9-18-91; 8:45 am]

BILLING CODE 3510-DS-M

[A-122-057]

Replacement Parts for Self-Propelled Bituminous Paving Equipment From Canada; Final Results of Antidumping Duty Administrative Review

AGENCY: International Trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of final results of antidumping duty administrative review.

SUMMARY: On December 11, 1990, the Department of Commerce published the preliminary results of its administrative review of the antidumping finding on replacement parts for self-propelled bituminous paving equipment from Canada. The review covers one producer/exporter of this merchandise to the United States, Allatt Paving Equipment Division of Ingersoll-Rand Canada, Inc. (Allatt/IR), and the period January 1, 1989 through August 31, 1989. Based on our analysis of the comments received, additional information requested, and correction of certain clerical errors, we determine the dumping margin for Allatt/IR to be 11.87 percent.

EFFECTIVE DATE: September 19, 1991.

FOR FURTHER INFORMATION CONTACT: Arthur N. DuBois or John R. Kugelman, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone: (202) 377-8312/3601.

SUPPLEMENTARY INFORMATION:

Background

On December 11, 1990, the Department of Commerce (the Department) published in the **Federal Register** (55 FR 50855) the preliminary results of its administrative review of the antidumping finding on replacement parts for self-propelled bituminous paving equipment from Canada (42 FR 41811, September 7, 1977). The Department has now completed that administrative review in accordance with section 751 of the Tariff Act of 1930 (the Tariff Act).

Scope of Review

Imports covered by this review are shipments of replacement parts for self-propelled bituminous paving equipment, excluding attachments and parts for attachments. This merchandise is currently classifiable under Harmonized Tariff Schedule (HTS) items 4016.93.10, 7315.11.00, 7315.89.50, 7315.90.00, 8336.50.00, 8479.99.00, 8481.20.00, 8482.10.10, 8483.90.90, 8539.29.20, 8544.20.00, 8544.41.00, 8544.51.80, 8544.60.20, and 9015.30.40. The HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

The review covers one exporter of this merchandise to the United States, Allatt/IR, and the period January 1, 1989 through August 31, 1989.

Analysis of Comments Received

We invited interested parties to comment on the preliminary results. At the request of Allatt/IR, we held a public hearing on February 7, 1991. We received comments from the petitioner, Blaw-Knox Construction Equipment Corporation (Blaw-Knox), and from Allatt/IR.

Comment 1

Blaw-Knox contends that the Department incorrectly allowed the full percentage amount of the Canadian Federal Sales Tax (FST) as an adjustment to U.S. Price (USP) with respect to Canadian taxes rebated or not collected by reason of exportation even though exemptions to that tax were available to Allatt/IR pursuant to the Canadian excise tax statute. Specifically, Blaw-Knox contends that the Department did not verify total taxes paid to determine whether or not the respondent actually had availed itself of any exemptions. Blaw-Knox further contends that the Department did not adequately verify that the respondent had incurred and paid the FST, because the Department verified only one transaction.

Allatt/IR disagrees with Blaw-Knox, claiming that the total taxes paid by the company are irrelevant, and that attempting to tie total taxes paid by the company to sales of covered parts would serve no purpose.

Department's Position

Only sales with a net selling price greater than C$2,000 were exempt from the FST. For those sales, we did not make any adjustment for FST. However, for the remaining sales, we used the full percentage amount of the FST as an adjustment to USP. See Comment 2.

In accordance with our standard verification practice, we selected certain transactions and verified the expenses associated with those transactions, including taxes. The Department is not required to verify every figure reported in the questionnaire response. The process of verification involves spot-checking and cross-checking the information that the Department selects for emphasis in analyzing each specific response. Once we verify certain selected sales, we deem the results of the verified sales to be representative of the entire questionnaire response. See Certain Dried Heavy Salted Codfish from Canada; Final Results of Antidumping Administrative Review (52 FR 42703).

In this case, we randomly selected one transaction and verified that the respondent had incurred the FST at the applicable tax rate. We then examined monthly worksheets and a check remitted to the Government of Canada in payment of the FST. We deem the verified result of this transaction to be representative of Allatt/IR's tax data. *See Codfish, supra.*

Comment 2

Blaw-Knox argues that the Department ignored the instructions of the Court of International Trade (CIT) by failing to limit the addition to USP to the amount of the FST "passed through" to the customer and by making a circumstance-of-sale (COS) adjustment for differences between the Canadian and constructed U.S. FST. (*See Zenith Electronics Corp.* v. *United States*, 633 F. Supp. 1882 (1986), *appeals dismissed*, Fed. Cir. Nos. 88–1259 and 88–1260 (1989) (*Zenith*).)

Department's Position

We do not agree with the CIT in *Zenith* concerning the "pass-through" argument, but have not had an opportunity to appeal the issue on its merits. The statutory language "added to or included in the price," as appearing in 19 U.S.C. 1677a(d)(1)(C) (1991), does not require a measurement of tax incidence in the home market in an economic sense. Therefore, consistent with our longstanding practice, we have not attempted to measure the amount of tax "passed through" to customers in the home market. Rather, we have added to USP the full amount of the tax that we conclude the Canadian tax authorities would have collected on export sales had such sales been subject to the tax, because the full amount of the home market (HM) sales tax was "added to or included in" the price of comparison models sold in Canada. See 19 U.S.C. 1677a(d)(1)(C) (1991).

The Government of Canada assesses the applicable sales tax rate, exclusive of any other taxes under the Excise Tax Act (ETA), against the ex-factory price of the subject merchandise. In other words, the "sales price," or tax base for purposes of calculating the consumption tax, includes "in addition to the amount charged as price," the following charges or expenses "whether payable at the same time or any other time": (1) Packing/wrapping/container costs; (2) financing, commission, and advertising expenses; (3) service and warranty expenses; and (4) any other similar charges. See ETA, Sec. 42, para. 91–657; Sec. 46(a). The "sales price" also includes any excise duties incurred within the meaning of the ETA. *Id.* The "sales price," however, excludes (1) any inspection/marking/stamping/certification fees paid to the Government of Canada, and (2) any transportation or installation charges included in the final selling price of the subject merchandise. See ETA, Sec. 46(c).

To make an appropriate "apples-to-apples" comparison, we used the ex-factory packed price of the U.S. product as the U.S. tax base. We calculated the constructed U.S. FST by multiplying the U.S. tax base by the applicable tax rate and then added the resulting amount of constructed tax to USP. We did not "cap" or otherwise reduce the amount of constructed tax that should be added to USP. Because the full amount of the FST was "added to or included in" the HM price, such an adjustment to the constructed U.S. tax would have been inconsistent with our efforts to make an appropriate "apples-to-apples" comparison between foreign market value (FMV) and USP.

In those instances in which we added the constructed U.S. FST to USP, we also made a COS adjustment to FMV, pursuant to 19 U.S.C. 1677b(a)(4)(B) (1991), for the difference between the home market FST and the constructed U.S. FST. We did so by subtracting the home market FST from FMV and then by adding the constructed U.S. FST to FMV. We made this COS adjustment so that differences between the Canadian FST and the constructed U.S. FST would not artificially inflate or deflate Allatt/IR's dumping margins.

Comment 3

Blaw-Knox contends that the Department erred in using constructed value (CV) information for FMV, rather than insisting that Allatt/IR provide information on HM sales of similar merchandise. Blaw-Knox claims that the Department unlawfully delegated its authority to the respondent to determine what to use as a basis for FMV for comparison to U.S. sales where no identical merchandise was sold in the home market.

Allatt/IR counters that because each part is unique and generally not interchangeable with another part, and because of the large number of parts in the review, it is not practical to determine similar merchandise and provide difference-in-merchandise adjustments. Allatt/IR also contends that it provided CV data because the Department had given the respondent the option of providing data on HM similar merchandise or CV data.

Department's Position

We agree with Blaw-Knox. The Tariff Act requires the Department, in the absence of identical merchandise sold in the home market, to use sales of similar merchandise in that market, if available, to calculate FMV when the home market is viable. 19 U.S.C. 1677b(a)(2) (1991). In order to satisfy this statutory requirement, we attempted to determine whether Allatt/IR had sold similar merchandise in the home market before considering Allatt/IR's CV data to establish FMV.

After the hearing on the preliminary results of this review, we requested that both parties furnish us with criteria that would enable us to determine whether similar merchandise was sold in the home market, and also requested that Allatt/IR provide data on HM sales of potentially similar merchandise during the period of review. Allatt/IR submitted data for 105 of the 491 U.S. parts for which we had requested information, but did not provide data for the remaining 386 parts for which we had requested information.

The Tariff Act defines "similar merchandise" to include, *inter alia*, merchandise (1) "produced in the same country and by the same person and of the same general class or kind as the merchandise which is the subject of the investigation," (2) "like that merchandise in the purposes for which used," and (3) "which the administering authority determines may reasonably be compared with" the subject merchandise. 19 U.S.C. 1677(16)(C) (1991).

To determine whether the merchandise for which Allatt/IR had submitted data satisfied the statutory requirement for similar merchandise listed above, we used the comparison criteria supplied by Allatt/IR: (1) Part name; (2) material composition; and (3) configuration (*e.g.* size, shape, length, thickness). Based on the evidence in the record, we determine that, for 37 out of the 105 U.S. parts for which Allatt/IR had submitted information, there were parts sold in the home market that had descriptions identical to and material compositions and configurations similar to those of their U.S. counterparts. Therefore, we determine that these 37 parts are "produced in the same country and by the same person and of the same general class or kind" as the subject merchandise. See 19 U.S.C. 1677(16)(C)(i) (1991).

However, we found that 68 of the 105 U.S. parts for which Allatt/IR had provided information on potentially similar HM merchandise had no HM counterpart that satisfied all four of the comparison criteria. For our treatment of the 68 parts, see Comment 4.

Based on the evidence in the record, we also determine that each of the referenced 37 HM parts and its U.S. counterparts performs the same function in a paving machine, and that all the parts have the same primary use—namely, that of a replacement part for self-propelled bituminous paving equipment. Therefore, we determine that the 37 HM parts are "like [the subject

merchandise] in the purposes for which used." See 19 U.S.C. 1677(16)(C)(ii) (1991).

Finally, because we found that the manufacturing costs of these 37 HM parts and their U.S. counterparts were within twenty (20) percent of each other, we determine that it is reasonable to make appropriate adjustments for differences in physical characteristics between the HM and U.S. parts. Because these adjustments are not substantial, we determine that the 37 HM parts in question "may reasonably be compared" with the subject merchandise. See 19 U.S.C. 1677(16)(C)(iii) (1991).

Because the referenced 37 HM parts (1) fall within "the same general class or kind" of merchandise as the subject merchandise, (2) are "like [the subject merchandise] in the purposes for which used," and (3) "may reasonably be compared" with the subject merchandise, we determine that Allatt/IR sold "similar merchandise" within the meaning of the Tariff Act in the home market during the period of review. *See* 19 U.S.C. 1677(16)(C) (1991). As a result, we reject Allatt/IR's argument that the HM merchandise is not similar to the U.S. merchandise because each part is unique and generally not interchangeable with another part.

Comment 4

Blaw-Knox argues that, because Allatt/IR has not provided the Department with all of the information that it requested, despite more than one request and more than one extension by the Department, the Department should use the best information available (BIA) for the missing information.

Department's Position

The Tariff Act requires that the Department use BIA whenever a party "refuses or is unable to produce information requested in a timely manner and in the form required, or otherwise significantly impedes an investigation", 19 U.S.C. 1677e(c) (emphasis added). On repeated occasions during this review, we requested that Allatt/IR provide us with information on HM sales of potentially similar merchandise for 491 U.S. parts. On April 12, 1991, we asked both Blaw-Knox and Allatt/IR to suggest criteria that should be considered in selecting similar HM merchandise; we also gave Allatt/IR 2 weeks to furnish required sales data on similar HM merchandise. On April 25, 1991, Allatt/IR requested a 60-day extension of time. We granted Allatt/IR a 3-week extension until May 13, 1991. On that date, we received an incomplete response (Allatt/IR submitted data for only 2 of the 4 criteria for some of the potentially similar HM parts). On May 30, 1991, we sent Allatt/IR a supplemental request, identifying the deficiencies in the May 13 response, and we gave the firm 1 week to respond. On June 5, 1991, Allatt/IR informed us it would need 2 more months and again urged us to use CV. On June 26, 1991, we granted Allatt/IR until July 3, 1991 to respond to our request for information on similar merchandise. On July 1, 1991, we extended the deadline until July 5, 1991. On July 5, 1991, Allatt/IR submitted a response that again was incomplete; this response provided data identifying the 4 criteria for only some of the HM parts. Thus, more than once Allatt/IR requested additional time to respond, and more than once we granted Allatt/IR extensions of time to respond.

Despite these repeated requests for an extension of time by Allatt/IR, and despite several extensions of time granted by the Department, Allatt/IR failed to "produce the information requested" for 386 U.S. parts. *Id.* Accordingly, we have used BIA to establish the dumping margins for these sales. *See id.* We also used BIA to establish the dumping margin for sales of 13 of the 68 U.S. parts for which there were no HM sales of similar parts, but for which Allatt/IR did not provide any CV data. Our selection of BIA is discussed in our response to Comment 5.

Comment 5

Allatt/IR contends that the Department was correct in preliminarily using a BIA rate for certain sales where no FMV information was furnished, but argues that the Department's selection of the 9.47 percent rate as BIA in the preliminary results of review is unreasonable. Specifically, Allatt/IR contends that the rate of 9.47 percent, the final dumping rate from the immediately preceding review, is based in part upon BIA. Allatt/IR further contends that the previous manufacturer of the subject merchandise has challenged the Department's selection of BIA in the last review before a U.S.-Canada binational panel.

Allatt/IR also claims that, because it is a new participant in these reviews, it should not be subject to a high rate caused by the previous manufacturer's pricing practices and deficiencies in responding to the Department's questionnaires. Allatt/IR further argues that the Department should use a rate from a previous review that itself was not a BIA rate.

Blaw Knox counters that Allatt/IR's argument—that the Department should not select a BIA rate from a previous review as the best information in this review, because Allatt is a new participant to the proceeding—strains credulity. Blaw Knox also argues that the Department was incorrect in its choice of the BIA rate of 9.47 percent in the preliminary results, claiming that the appropriate rate is either 57.13 percent from the original petition or, at least, the less-than-fair-value (LTFV) margin of 30.61 percent, which the Department selected as BIA in the last review.

Department's Position

The Federal Circuit has held that the purpose of the BIA rule is to induce a noncomplying respondent, in the absence of any subpoena power vested in the agency, to provide the Department with timely, complete, and accurate factual information, so that the Department can "determin[e] current margins as accurately as possible." *Rhone Poulenc Inc.*, v. *U.S.*, 899 F.2d 1185, 1191 (Fed. Cir. 1990). Because each investigation and administrative review present the Department with a unique set of facts and circumstances, the Department often must select an appropriate unique BIA rate to achieve the purpose of the rule. See Final Results of Antidumping Duty Administrative Review; Steel Jacks From Canada (52 FR 32, 957) ("Selection of the best information available is made on a case-by-case basis").

The Federal Circuit's decision in *Rhone Poulenc* teaches that in selecting a BIA rate to achieve the purpose of the BIA rule, the Department is authorized, pursuant to the Tariff Act, to draw an adverse presumption or inference against a noncomplying respondent. See *Rhone Poulenc*, 899 F.2d at 1190–1191. In drawing this adverse inference, the Department is authorized to select as BIA the "highest prior margin," which may include the LTFV margin from the initial investigation, and presume that this margin is "the best information on current margins." *Id.* at 1190.

A corollary to the rebuttable adverse presumption that the Department can legally draw is that the agency's selection of BIA cannot "reward" a noncomplying respondent. *Rhone Poulenc*, 899 F.2d at 1188. In other words, the noncomplying respondent cannot find itself in a better position as a result of failing to comply with the Department's information request than had the respondent provided the Department with complete, accurate, and timely data. See *id.* "Otherwise, alleged unfair traders would be able to control the amount of antidumping duties by selectively providing [the Department] with information." *Olympic*

Adhesives v. *United States*, 899 F.2d 1565, 1572 (Fed. Cir. 1990).

"What is required [in the selection of BIA during an administrative review] is that the [Department] obtain and consider the most recent information in its determination of what is the best information." *Rhone Poulenc*, 899 F.2d at 1190 (emphasis supplied in original). In considering recent dumping margins as BIA and ultimately selecting a BIA rate, the statute and the implementing regulation direct the Department to evaluate the nature of the information on the record (*e.g.*, completeness of the response), as well as the respondent's actions during the administrative proceeding. *See* 19 U.S.C. 1677e(c) (1991); 19 CFR 353.37(b) (1991); *Rhone Poulenc*, 899 F.2d at 1191; Antifriction Bearings (Other Than Tapered Roller Bearings) and Parts Thereof from The Federal Republic of Germany; Final Results of Antidumping Duty Administrative Review (56 FR 31692, 31706) (first administrative review).

In selecting the BIA rate for Allatt/IR in the final results of this administrative review, we first considered the following rates: (1) All of the dumping margins calculated for Allatt/IR's legal predecessor companies in the previous administrative reviews, including the 14.30 percent margin calculated for the exporter's sales price (ESP) transactions in the second review, (2) the LTFV margin of 30.61 percent, and (3) the 57.13 percent dumping margin alleged in the petition.

Contrary to the respondent's contention, we are not required to limit our selection of BIA to dumping margins calculated for that particular respondent during previous administrative reviews or the initial investigation. The Tariff Act authorizes the Department to select a dumping margin of another respondent company as BIA for a respondent that has failed to comply with an information request by the Department. See Antifriction Bearings (56 FR 31706) (first administrative review) (where Department selected LTFV margin of another respondent as BIA for a noncomplying respondent during the first administrative review).

Furthermore, contrary to the respondent's contention, Allatt/IR legally is not a new participant in this administrative review. Because Allatt/IR purchased all of the assets and the entire paver parts business of Fortress Allatt Ltd., the respondent that requested the last administrative review, Allatt/IR is the legal successor-in-interest to the previous respondent(s) subject to the prior administrative reviews for purposes of the U.S. antidumping law. Accord Replacement Parts for Self-Propelled Bituminous Paving Equipment from Canada, USA–89–1904–02, –03, –05 (November 28, 1989) (where a binational panel decided that Allatt/IR is the legal successor-in-interest to the respondent in that last review).

Because the Department is not limited in its selection of BIA to the dumping margins established for a particular respondent company during previous reviews or the initial investigation, and because Allatt/IR is the legal successor-in-interest to the previous respondents(s) subject to the prior administrative reviews, we have not excluded from our pool of potential BIA rates any previous dumping margin calculated for any of Allatt/IR's predecessor companies. Furthermore, we have considered all such margins, whether or not any such margin was based upon actual price data or upon BIA.

Therefore, based upon the principles articulated by the Federal Circuit in *Rhone Poulenc*, and based upon the facts of this administrative review, we are selecting the LTFV margin of 30.61 percent as BIA for Allatt/IR. Our selection of this adverse BIA rate is based in large part upon Allatt/IR's repeated failure, despite several requests, to supply complete information on HM sales of potentially similar merchandise for 386 out of 491 U.S. parts. Allatt/IR's repeated failures to submit complete data for similar merchandise, together with the respondent's failure to provide CV data for 13 U.S. sales, significantly impeded the completion of this administrative review. Selection of an adverse BIA rate, based in whole or in part upon significant impediment, is consistent with 19 CFR 353.37(b) (1991).

In selecting the fair value margin of 30.61 percent as BIA in this review, we rejected all of the dumping margins calculated in previous reviews that were lower than the 7.49 percent rate calculated in this review for those U.S. sales for which we had FMV data. Selection of any of these lower rates as BIA would have "rewarded" Allatt/IR for its noncompliance with our information requests during this administrative review.

We also rejected the remaining dumping margins (*i.e.*, 9.47 percent and 14.30 percent) calculated for Allatt/IR's legal predecessor companies in the previous administrative reviews. In the final results of the immediately preceding administrative review, we selected as BIA the LTFV margin of 30.61 percent, which was higher than any of the dumping margins calculated during any of the previous administrative reviews. We selected this margin in an attempt to induce the respondent to provide the Department with timely, complete, and accurate factual information in subsequent administrative reviews.

Despite our selection of the fair value margin of 30.61 percent as BIA in the immediately preceding review, Allatt/IR failed to provide most of the information that we requested on HM sales of similar merchandise during the course of the current review. Accordingly, we determine that any of the margins calculated in the previous reviews, which are all lower than the fair value margin of 30.61 percent, would be insufficient to induce cooperation with our requests for information in future reviews.

Furthermore, choosing a BIA rate lower than the 30.61 percent BIA rate selected in the previous review would "reward" Allatt/IR for its consistent pattern of noncompliance with our information requests during the current administrative review. Therefore, we did not select as BIA either the final dumping margin of 9.47 percent calculated for Allatt/IR's legal predecessor company in the immediately preceding review or the 14.30 percent margin calculated for the ESP transactions of Allatt/IR's predecessor company in the second review.

We did not select the 14.30 percent ESP margin as BIA for an additional reason. This margin was based upon only twenty-nine (29) percent of the respondent's total sales and, therefore, was not the respondent's final dumping margin in the second review. (55 FR 7600 (1986)). The final dumping margin for Allatt/IR's predecessor company in that review was 4.2 percent. (*Id.*) We prefer to select as BIA a final or overall dumping margin derived from total sales, rather than a partial margin derived from a subset of total sales.

After rejecting all of the dumping margins calculated in the previous administrative reviews, only two adverse BIA rates, the 30.61 percent LTFV margin and the petition rate of 57.13 percent, remained in our BIA pool. We rejected the 57.13 percent margin alleged in the petition because, although Allatt/IR significantly impeded the completion of the current administrative review, it did make several attempts to respond to our requests for data on similar merchandise. The selection of the most adverse BIA rate is not warranted under these circumstances. Accordingly, for these final results, we have selected as BIA the LTFV margin of 30.61 percent to establish the dumping

margins for 399 U.S. sales in order to induce the Canadian respondent to comply with information requests in future administrative reviews.

Comment 6

Blaw-Knox contends that the respondent failed verification with respect to the CV data submitted to the Department. As a result, Blaw-Knox urges the Department to rely exclusively upon BIA to establish the respondent's dumping margins in this review.

Department's Position

We disagree with Blaw-Knox's contention. Allatt/IR derived its CV data by adding variances to its standard costs and then by allocating the resulting costs over all covered parts. Although only standard costs, excluding variance figures, were used in the initial response, variance figures for labor, materials, and factory overhead, based on actual costs for the period of review, were available by the time of verification.

Although the verification report states that certain CV data were incomplete or outdated, these data were limited to labor cost standards. Despite the fact that Allatt/IR had relied on data from a prior period to estimate the amount of time expended in the various stages of the production process, we are satisfied that these times did not change from the previous review period. Blaw-Knox provided no evidence to the contrary. Furthermore, Allatt/IR provided wage rates for the current review period, and we verified that these rates were accurate. Therefore, we determine that the respondent's CV data were adequate and that they included all costs.

Comment 7

Blaw-Knox contends that the Department erred by failing to require that the respondent provide sale-by-sale information on commissions and prepaid freight. Allatt/IR claims that the only practical way to account for those expenses was to allocate them over all sales within the scope of the finding.

Department's Position

We agree with Blaw-Knox that, whenever possible, freight adjustments should be reported on a sale-by-sale basis, rather than on an overall percentage basis. However, the shipments to warehouses in Canada and in the United States were consolidated shipments of various types of merchandise, only some of which were covered by the antidumping finding. Because Allatt/IR's freight expense records reflect aggregate expenses attributable to various products and sales, rather than transaction-by-transaction expenses, we allocated the freight expenses, in accordance with our standard practice, to the subject merchandise. We multiplied the total freight expenses incurred by the subject and non-subject merchandise by the ratio of sales of the subject merchandise over total sales which also included non-covered merchandise. This methodology reasonably allocates the freight expenses to the subject merchandise. However, for those few sales for which freight was prepaid, we deducted the prepaid freight. We have recalculated our results accordingly.

With respect to commission expenses in both markets, Allatt/IR failed to provide a breakdown of its data to demonstrate whether any, or how many, of the subject sales incurred the claimed expenses. Granting any adjustment under these circumstances could understate the respondent's dumping margin. For these reviews, we have denied the claimed adjustment.

Comment 8

Allatt/IR contends that if the Department makes a deduction from ESP for inventory carrying costs, the statute requires the Department make the same adjustment to FMV. Blaw-Knox contends that the Department acted correctly by not granting an adjustment for which the respondent never had provided information and for which it never had claimed an adjustment.

Department's Position

Pursuant to 19 CFR 353.31 (1991), we requested and received information on inventory carrying costs in the home market. We have recalculated the final results to account for these expenses in both markets.

Comment 9

Allatt/IR contends that the Department committed clerical errors in calculating both credit costs and indirect expenses in both markets.

Department's Position

We agree and have corrected our calculations accordingly.

Comment 10

Citing the Department's verification report, Blaw-Knox contends that Allatt/IR's pricing practices may constitute a fictitious market. Specifically, Blaw-Knox contends that Allatt/IR maintains a price list for both U.S. and Canadian sales, but, for the Canadian market, Allatt/IR uses the same price list plus a factor to account for currency differences. Blaw-Knox contends that such post-order pricing adjustments should be disregarded to the extent that the practice eliminates dumping margins.

Department's Position

It is unnecessary to address the question of whether Allatt/IR's pricing practices constitute a fictitious market within the meaning of 19 U.S.C. 1677b(a)(5), because the only evidence offered by the petitioner would result in an addition to FMV, rather than a reduction from FMV, with a corresponding increase, rather than decrease, in Allatt/IR's dumping margins.

Final Results of the Review

As a result of the comments received and the correction of certain clerical errors, we have revised our preliminary results, and we determine that the margin for Allatt/IR for the period January 1, 1989 through August 31, 1989, is 11.87 percent. The overall margin is a weighted-average margin based upon (1) actual margins calculated for U.S. sales with corresponding FMV information (*i.e.*, data for HM sales of identical and similar merchandise and CV data), and the 30.61 percent BIA rate used for the missing FMV data.

The Department will instruct the U.S. Customs Service to assess antidumping duties on all appropriate entries. Individual differences between USP and FMV may vary from the percentage stated above. The Department will issue appraisement instructions directly to the Customs Service.

Furthermore, the following deposit requirements will be effective upon publication of these final results for all shipments of replacement parts for self-propelled paving equipment from Canada entered, or withdrawn from warehouse, for consumption on or after the publication date, as provided by section 751(a)(1) of the Tariff Act: (1) The cash deposit rate for Allatt/IR will be 11.87 percent; (2) for merchandise exported by manufacturers or exporters not covered in this review but covered in previous reviews or the final determination in the original less-than-fair-value investigation, the cash deposit rate will continue to be the rate published in the most recent final results or determination for which the manufacturer or exporter received a company-specific rate; and (3) the cash deposit rate for any future entries from all manufacturers of exporters who are not covered in this or prior administrative reviews and who are unrelated to the reviewed firm or any previously reviewed firm, will be 11.87

percent. This is the most current non-BIA rate for any firm in this proceeding.

This administrative review and this notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 353.22.

Dated: September 11, 1991.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR 91-22633 Filed 9-18-91; 8:45 am]

BILLING CODE 3510-DS-M

[A-461-008]

Titanium Sponge From the U.S.S.R. Determination not to Revoke Antidumping Duty Finding

AGENCY: International trade Administration/Import Administration, Department of Commerce.

ACTION: Notice of determination not to revoke antidumping duty finding.

SUMMARY: The Department of Commerce is notifying the public of its determination not to revoke the antidumping duty finding on titanium sponge from the U.S.S.R.

EFFECTIVE DATE: September 19, 1991.

FOR FURTHER INFORMATION CONTACT: Fred Baker or Robert Marenick, Office of Antidumping Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC, 20230; telephone (202) 377-5255.

SUPPLEMENTARY INFORMATION: On August 1, 1991, the Department of Commerce (the Department) published in the **Federal Register** (56 FR 36768) its intent to revoke the antidumping duty finding on titanium sponge from the U.S.S.R. (33 FR 12138; August 28, 1968). The Department may revoke a finding if the Department concludes that the finding is no longer of interest to parties. We had not received a request for an administrative review of this finding for the last four consecutive annual anniversary months and therefore published a notice of intent to revoke pursuant to 353.25(d)(4) of the Department's regulations (19 CFR 353.25(d)(4)).

On August 8, 1991, RMI Titanium Company, petitioner in the original investigation, objected to our intent to revoke the finding. On August 23, 1991, Oregon Metallurgical Corporation, an interested party, objected to our intent to revoke the finding. On August 27, 1991, Titanium Metals Corporation, an interested party, objected to our intent to revoke the finding. Therefore, we no longer intend to revoke the finding.

Dated: September 11, 1991.

Joseph A. Spetrini,

Deputy Assistant Secretary for Import Administration.

[FR Doc. 91-22634 Filed 9-18-91; 8:45 am]

BILLING CODE 33510-DS-M

[C-351-037]

Cotton Yarn From Brazil; Preliminary Results of Countervailing Duty Administrative Review

AGENCY: International Trade Administration/Import Administration Department of Commerce.

ACTION: Notice of Preliminary Results of Countervailing Duty Administrative Review.

SUMMARY: The Department of Commerce has conducted an administrative review of the countervailing duty order on cotton yarn from Brazil. We preliminarily determine the net subsidy to be zero for one firm, 0.20 percent *ad valorem* for one firm, 7.75 percent *ad valorem* for one firm, and 1.29 percent *ad valorem* for all other firms for the period January 1, 1990 through December 31, 1990. In accordance with 19 CFR 355.7, any rate less than 0.50 percent *ad valorem* is *de minimis.* We invite interested parties to comment on these preliminary results.

EFFECTIVE DATE: September 19, 1991.

FOR FURTHER INFORMATION CONTACT: Elizabeth Levy or Michael Rollin, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone (202) 377-5260.

SUPPLEMENTARY INFORMATION:

Background

On March 8, 1991, the Department of Commerce (the Department) published in the **Federal Register** a notice of "Opportunity to Request Administrative Review" (56 FR 9936) of the countervailing duty order on cotton yarn from Brazil (42 FR 14089; March 15, 1977) for the period January 1, 1990 through December 31, 1990. On April 1, 1991, the Government of Brazil requested an administrative review for that period. We initiated the review on April 18, 1991 (56 FR 15856). The Department has now conducted this review in accordance with section 751 of the Tariff Act of 1930, as amended (the Tariff Act). The final results of the last administrative review of this order were published in the **Federal Register** on July 10, 1990 (55 FR 28269).

Scope of Review

Imports covered by this review are shipments of Brazilian yarn, carded but not combed, wholly of cotton. During the review period, such merchandise was classifiable under item numbers 5205.11.10, 5205.11.20, 5205.12.10, 5205.12.20, 5205.13.10, 5205.13.20, 5205.14.10, 5205.14.20, 5205.15.10, 5205.15.20, 5205.31.00, 5205.32.00, 5205.33.00, 5205.34.00, and 5205.35.00 of the Harmonized Tariff Schedule (HTS). The HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

The review covers the period January 1, 1990 through December 31, 1990, six programs and the following nine producers/exporters of cotton yarn from Brazil: Cia Industrial e Agricola Boyes, Companhia Brasileira de Fiacao, Filobel S.A.—Industrias Texteis do Brasil, Fiacao Nordeste do Brasil S.A.—Finobrasa, Cotonificio Guilherme Giorgi S.A., Fiacao e Tecelagem Kanedo do Brasil S.A., Nisshinbo do Brasil Industria Textil Ltda., Toyobo do Brasil Industria Textil, Unitika do Brasil Industria Textil Ltda.

These companies accounted for ninety percent of exports of cotton yarn to the United States during the period of review.

Hyperinflationary Economies

According to statistics published by the Brazilian government, the annual inflation in Brazil during the review period was 1,285 percent. Under such circumstances, the clustering of nominal countervailable benefits either at the beginning or at the end of the review period would tend to distort the real value of the benefit bestowed on the firm. In this review, benefits from the SUDENE and Income Tax Reduction for Export Earnings programs were received at the beginning of the review period. Therefore, we have made a downward adjustment to the nominal values of annual exports or sales to calculate the benefit from these programs. This adjustment is based on the price deflator index used by the Brazilian government during the period of review, the Bonus do Tesouro Nacional (BTN). For further explanation of this methodology see Final Negative Countervailing Duty Determination: Silicon Metal From Brazil (56 FR 26988, June 12, 1991).

Calculation Methodology for Assessment and Cash Deposit Purposes

In calculating the benefits received during the review period, we followed the methodology described in the preamble to 19 CFR 355.20(d) (53 FR

52325; December 27, 1988). First, we calculated a country-wide rate, weighted-averaging the benefits received by the nine companies subject to review to determine the overall subsidy from all countervailing programs benefitting exports of the subject merchandise to the United States. Because the country-wide rate was above *de minimis*, as defined by 19 CFR 355.7, we proceeded to the next step in our analysis and examined the *ad valorem* rate we had calculated for each company for all countervailing programs combined, to determine whether individual company rates differed significantly from the weighted-average country-wide rate. Two companies received aggregate benefits which were zero or *de minimis* (significantly different within the meaning of 19 CFR 355.22(d)(3)(ii)); one company, Fiacao Nordeste do Brasil S.A.—Finobrasa, received aggregate benefits which were otherwise significantly different in accordance with 19 CFR 355.22(d)(3)(i). These three companies must be treated separately for assessment and cash deposit purposes.

The remaining six companies received aggregate benefits from all countervailing programs combined which were not significantly different from the weight-average country-wide rate; their rates were used in the calculation to establish the "all other" rate for the review period. See, e.g., Final Results of Countervailing Duty Administrative Review; Certain Apparel from Argentina (56 FR 41823; August 23, 1991) and Final Results of Countervailing Duty Administrative Review; Ceramic Tile from Mexico (56 FR 27496; June 14, 1991).

Analysis of Programs

(1) Income Tax Reduction for Export Earnings

This program was previously named Income Tax Exemption for Export Earnings. Under this program, exporters of cotton yarn are eligible for an exemption from income tax on the portion of their profits attributable to exports. The exporter calculates the tax-exempt portion of profit based on the ratio of export revenue to total revenue. Because this program provides tax reductions that are limited to exporters, we preliminarily determine that it is countervailable.

The nominal corporate tax rate in Brazil in 1990 was 30 percent, while under this program, profits from export sales were taxed at a rate of three percent. Furthermore, Brazilian tax law permits all companies to reduce their income taxes by investing up to 24 percent of their tax liability in specified companies and funds. Three cotton yarn exporters claimed this income tax reduction for export earnings on their tax returns filed in 1990 and invested in the specified companies and funds, which lowered their effective tax rate below the nominal 30 percent rate during the period of review.

We calculated the effective tax rate for each firm by dividing the net tax liability by taxable profit. In order to adjust for hyperinflation, the subsequent figures were converted into BTN using the same BTN rate used in the tax returns. We calculated the benefit by multiplying the amount of tax-exempt profit by the effective tax rate and allocating the result over each firm's total exports. Each firm's total exports in new Cruzados for 1990 were deflated using the average BTN rate for 1990. We then weight-averaged the benefits by the each firm's share of exports of the subject merchandise to the United States. On this basis, we preliminarily determine the benefit from this program to be zero for Unitika do Brasil Industria Textil Ltda. and Fiacao Nordeste do Brasil S.A.—Finobrasa, 0.01 percent *ad valorem* for Fiacao e Tecelagem Kanebo do Brasil S.A., and 0.36 percent *ad valorem* for all other firms for the period January 1, 1990 through December 31, 1990.

Decree Law 8034 of April 12, 1990 eliminated this tax exemption and established a prevailing tax rate of 30 percent for domestic and export earnings for tax year 1990 (which is filed in 1991). We consider this elimination to be program wide change. Because it occurred prior to the issuance of these preliminary results and there are no residual benefits to the producers/exporters of cotton yarn, we have taken this program-wide change into account in setting our cash deposit rate. Therefore, for purposes of the cash deposit of estimated countervailing duties, we preliminarily determine the benefit from this program to be zero for all firms. See Countervailing Duties; Notice of Proposed Rulemaking and Request for Public Comment (54 FR 23366, May 31, 1989) § 355.50(a) (1) and (2) at page 23385.

(2) Reductions of Taxes and Import Duties through BEFIEX

The Commission for the Granting of Fiscal Benefits to Special Export Programs (BEFIEX) allows Brazilian exporters, in exchange for export commitments, to take advantage of several types of benefits, such as import duty reductions and accelerated depreciation for machinery used in the production of exports. Because this program provides tax reductions that are limited to exporters, we preliminarily determine that it is countervailable. Seven cotton yarn exporters received import duty tax reductions by virtue of their BEFIEX contracts during the review period.

To calculate the benefit, we divided the amount of each firm's import duty reductions received in 1990 by that firm's total exports in 1990. We then weight-averaged the benefits by each firm's share of exports of the subject merchandise to the United States. On this basis, we preliminarily determine the benefit to be zero for Unitika do Brasil Industria Textil Ltda., 0.19 percent *ad valorem* for Tiacao e Tecelagem Kanebo do Brasil S.A., 5.94 percent *ad valorem* for Fiacao Nordeste do Brasil S.A.—Finobrasa, and 0.93 percent *ad valorem* for all other firms.

Brazilian Law 8.032 of April 12, 1990 eliminated this program for new projects. However, the Department has not adjusted the cash deposit to take into account elimination of this program since we have determined that residual benefits may continue due to outstanding BEFIEX contracts. See Countervailing Duties; Notice of Proposed Rulemaking and Request for Public Comment (54 FR 23366, May 31, 1989) § 355.50(a) (1) and (2) at page 23385.

(3) SUDENE

According to Brazilian Law Number 4239 of June 27, 1963, as amended, and under Decree Number 64214 of March 18, 1969, as amended, companies located in the Northeast of Brazil are eligible for exemption from income tax for production attributable to SUDENE-approved projects. The intent of this program is to encourage development of this region of Brazil. Because this exemption is only available to companies located in a specific region of Brazil, we find this to be countervailable domestic subsidy.

One cotton yarn exporter is located in the Northeast of Brazil and received a tax exemption for production attributable to its SUDENE-approved projects. The amount of the tax exemption due to this program can be found on a company's tax returns denominated in BTN. The benefit is equal to the amount of the exemption.

We divided the benefit received by the company by its total sales in order to calculate the company's *ad valorem* subsidy. Since the benefit from this program was received near the beginning of the review period, the company's total sales in New Cruzados

were deflated using the average BTN rate for 1990. The individual benefits for each company were weight-averaged by the company's share of total exports of the subject merchandise to the United States. On this basis, we determined the benefit from this program to be 1.81 percent *ad valorem* for Fiacao Nordeste do Brasil S.A.—Finobrasa and zero for all other firms.

(4) Other Programs

We also examined the following programs and preliminarily determine that the exporters of the subject merchandise did not use them during the review period:

A. CACEX Preferential Working Capital Financing for Exports,

B. Preferential Export Financing under CIC–OPCRE of the Banco do Brasil,

C. Preferential Finançing for Industrial Enterprises by the Banco do Brasil (FST and EGF loans).

Preliminary Results of Review

As a result of our review, we preliminarily determine the net subsidy to be zero for Unitika do Brasil Industria Textil Ltda., 0.20 percent *ad valorem* for Fiacao e Tecelagem Kanedo do Brasil S.A., 7.75 percent *ad valorem* for Fiacao Nordeste do Brasil S.A.—Finobrasa, and 1.29 percent *ad valorem* for all other firms for the period January 1, 1990 through December 31, 1990. In accordance with 19 CFR 355.7, any rate less than 0.5 percent *ad valorem* is *de minimis.*

Therefore, the Department intends to instruct the Customs Service to liquidate, without regard to countervailing duties, shipments of this merchandise from Fiacao e Tecelagem Kanebo do Brasil S.A. and Unitika do Brasil Industria Textil Ltda. exported on or after January 1, 1990 and on or before December 31, 1990. The Department also intends to instruct the Customs Service to liquidate and assess countervailing duties of 7.75 percent of the f.o.b. invoice price for Fiacao Nordeste do Brasil S.A.—Finobrasa, and 1.29 percent of the f.o.b. invoice price on all other shipments of the subject merchandise exported on or after January 1, 1990 and on or before December 31, 1990.

The Department intends to instruct the Customs Service to waive cash deposits of estimated countervailing duties, as provided by section 751(a)(1) of the Tariff Act, on shipments of this merchandise from Fiacao e Tecelagem Kanebo do Brasil S.A. and Unitika do Brasil Industria Textil Ltda., and to collect a cash deposit of 7.75 percent of the f.o.b. invoice price from Fiacao Nordeste do Brasil S.A.—Finobrasa. The elimination of the Income Tax Reduction for Export Earnings program on April 12, 1990 decreases the total estimated duty deposit rate for all other firms to 0.93 percent *ad valorem*. These deposit rates are effective for all shipments entered, or withdrawn from warehouse, for consumption on or after the date of publication of the final results of this administrative review.

Parties to the proceeding may request disclosure of the calculation methodology and interested parties may request a hearing not later than 10 days after the date of publication of this notice. Interested parties may submit written arguments in case briefs on these preliminary results within 30 days of the date of publication. Rebuttal briefs, limited to arguments raised in case briefs, may be submitted seven days after the time limit for filing the case brief. Any hearing, if requested, will be held within seven days after the scheduled date for submission of rebuttal briefs. Copies of case briefs and rebuttal briefs must be served on interested parties in accordance with 19 CFR 355.38(e). Representatives of parties to the proceeding may request disclosure of proprietary information under administrative protective order no later than 10 days after the representative's client or employer becomes a party to the proceeding, but in no event later than the date the case briefs, under § 355.38(c), are due. The Department will publish the final results of this administrative review including the results of its analysis of issues raised in any case or rebuttal brief or at a hearing.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 355.22.

Dated: September 13, 1991.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 91–22636 Filed 9–18–91; 8:45 am]

BILLING CODE 3510–DS–M

[C–307–702]

Certain Electrical Conductor Aluminum Redraw Rod from Venezuela; Final Results of Countervailing Duty Administrative Review

AGENCY: International Trade Administration/Import Administration Department of Commerce.

ACTION: Notice of Final Results of Countervailing Duty Administrative Review.

SUMMARY: On May 29, 1991, the Department of Commerce published the preliminary results of its administrative review of the countervailing duty order on certain electrical conductor aluminum redraw rod from Venezuela (56 FR 24174; May 29, 1991). We have now completed that review and determine that there are no known unliquidated entries during the period January 1, 1989 through December 31, 1989. The rate of cash deposit of estimated countervailing duties will remain unchanged at 5.50 percent *ad valorem.*

EFFECTIVE DATE: September 19, 1991.

FOR FURTHER INFORMATION CONTACT: Gayle Longest or Barbara Tillman, Office of Countervailing Compliance, International Trade Administration, U.S. Department of Commerce, Washington, DC 20230; telephone (202) 377–2786.

SUPPLEMENTARY INFORMATION:

Background

On May 29, 1991, the Department of Commerce (the Department) published in the **Federal Register** (56 FR 24173) the preliminary results of its administrative review of the countervailing duty order on certain electrical conductor aluminum redraw rod from Venezuela (53 FR 31904; August 22, 1988). The Department has now completed that administrative review in accordance with section 751 of the Tariff Act of 1930, as amended (the Tariff Act).

Scope of Review

Imports covered by this review are shipments of certain electrical conductor aluminum redraw rod (EC rod) from Venezuela, which is wrought rod of aluminum electrically conductive and containing not less than 99 percent of aluminum by weight. This merchandise is classifiable under item numbers 7604.10.3010, 7604.10.3050, 7604.29.3010, 7604.29.3050, 7605.11.0030 and 7605.21.0030 of the Harmonized Tariff Schedule (HTS). The HTS item numbers are provided for convenience and Customs purposes. The written description remains dispositive.

The review covers the period January 1, 1989 through December 31, 1989 and seven programs.

In its questionnaire response, the Government of Venezuela reported no shipments of the subject merchandise to the United States during the review period. We subsequently confirmed with the United States Customs Service that there were no known unliquidated entries of this merchandise during the review period.

Analysis of Comments Received

We gave interested parties an opportunity to comment on the preliminary results. We received comments from the Government of Venezuela and the petitioner, Southwire Company.

Comment 1: The petitioner contends that the April 22, 1991 questionnaire response is inadequate due to an incorrect definition of "EC rod" as determined by the scope of the countervailing duty order. According to the petitioner, the scope of the countervailing duty order includes .250 wire as established in Electrical Conductor Aluminum Redraw Rod from Venezuela; Preliminary Affirmative Scope Ruling (55 FR 3434; February 1, 1990). However, the Government of Venezuela failed to include and report shipments of .250 inch wire during the 1989 review period in the questionnaire response. Currently, the liquidation of .250 inch wire imports is suspended and these imports are subject to the same cash deposit rate as .375 inch rod. Therefore, to accurately reflect the current level of countervailable subsidies for duty deposit purposes, exports of .250 inch wire must be taken into account.

The respondent counters that exports of .250 inch wire to the United States were not within the scope of the countervailing duty order during the 1989 review period. Although the Department determined in the preliminary affirmative scope ruling that .250 wire was within the scope of the countervailing duty order, suspension of liquidation for this merchandise was not ordered until February 1, 1990, the date of publication of the notice. Therefore, entries of .250 wire were not subject to suspension of liquidation during 1989 and were not subject to review during this period. Consequently, it is pointless for the Government of Venezuela to provide information on shipments of .250 wire during 1989 since, under the countervailing duty law, duties can be assessed only on entries of merchandise for which liquidation has been suspended.

Department's Position: We agree with the respondent that at the time of the review period, it had not yet been clarified that .250 inch wire was within the scope of the countervailing duty order. Liquidation of entries of .250 inch wire was not suspended until the preliminary affirmative scope ruling on February 1, 1990. The statute provides duties can be assessed only on entries of merchandise for which liquidation has been suspended. See 19 U.S.C. 1671(e)(b)(1). Therefore, it would not have been appropriate to request information on shipments of .250 inch wire made during the 1989 review period.

Comment 2: The petitioner claims that the questionnaire response is incomplete because information on exports of EC rod to countries other than the United States and possible benefits received on these exports are not reported. Moreover, petitioner argues that program-wide changes cannot be confirmed without information on benefits that EC rod producers or exporters received on non-U.S. shipments.

Conversely, the respondent argues that neither the countervailing duty law nor Department precedent requires the Government of Venezuela to provide information on benefits, if any, received for exports to countries other than the United States. Additional information on non-U.S. sales is irrelevant to the countervailing duty administrative review. Therefore, the demonstration of program-wide changes based on benefits received on non-U.S. shipments is useless.

Department's Position: We agree with the respondent. In Final Affirmative Countervailing Duty Determination; Miniature Carnations from Colombia (52 FR 32033; August 25, 1987), the Department held that bounties or grants provided specifically on exports to countries other than the United States are not countervailable under United States countervailing duty law. Since benefits paid on non-U.S. shipments are not countervailable, information on exports to countries other than the United States could not be used as a basis for determining whether there are subsidies on U.S. shipments. Therefore, additional information on export subsidies given to EC rod producers/exporters for exports to countries other than the United States is not necessary.

Comment 3: The petitioner alleges that there may be new subsidy programs that benefited EC rod producers and/or exporters during the 1989 review period which offset reductions in the Export Bond Program. In addition, they maintain that the claimed reduction in the Export Bond Program has never been confirmed by verification. Therefore, EC rod producers and/or exporters may still have been receiving higher benefits even after the alleged program-wide change.

In response, the respondent argues that according to Department regulations (19 CFR 355.31(c)(ii)), "the Secretary will not consider any subsidy allegation submitted by the petitioner * * * (ii) in an administrative review, 120 days after the date of publication of the notice of initiation of the review." The 1989 administrative review was initiated on September 24, 1990 (55 FR 39032), while the petitioner's case brief containing these allegations was filed more than 120 days later. Therefore, petitioner's allegations are untimely and cannot be considered.

Department's Position: We agree with the respondent. Petitioner's allegations are untimely, thus we cannot take them into account. Furthermore, in Certain Electrical Conductor Aluminum Redraw Rod From Venezuela; Final Results of Countervailing Duty Administrative Review (56 FR 14232; April 8, 1991) we addressed petitioner's concerns that program-wide changes in the Export Bond Program have not been confirmed through verification. We maintain our position that on-site verification is not required in order to recognize program-wide changes. In the case of the Export Bond Program, the reduction in the export bond percentages for products with a National Value Added (VAN) between 30 and 98 percent, such as EC rod, occurred prior to the publication of our preliminary results in the previous review (56 FR 679; January 8, 1991). This reduction was the result of an official act, Decree 1061, and on-site verification of the implementation of this decree is not required.

Final Results of Review

As a result of our review, we determine that there are no known unliquidated entries of the subject merchandise exported to the United States from the period January 1, 1989 through December 31, 1989. After reviewing all of the comments received, we recommend that the rate of cash deposit of estimated countervailing duties remain unchanged at 5.50 percent *ad valorem.*

The Department will instruct the Customs Service to collect a cash deposit of estimated countervailing duties of 5.50 percent of the f.o.b. invoice price on all shipments of this merchandise entered, or withdrawn from warehouse, for consumption on or after the date of publication of these final results of administrative review. This deposit requirement shall remain in effect until publication of the final results of the next administrative review.

This administrative review and notice are in accordance with section 751(a)(1) of the Tariff Act (19 U.S.C. 1675(a)(1)) and 19 CFR 355.22.

Dated: September 11, 1991.

Eric I. Garfinkel,

Assistant Secretary for Import Administration.

[FR Doc. 91-22637 Filed 9-18-91; 8:45 am]

BILLING CODE 3510-DS-M

Short Supply Determination: Certain Mirror-Polished Stainless Steel Sheet

AGENCY: Import Administrative/International Trade Administration, Commerce.

ACTION: Notice of short-supply determination; certain mirror-polished stainless steel sheet with non-directional unbroken mirror finish.

SHORT-SUPPLY REVIEW NUMBER 57.

SUMMARY: The Secretary of Commerce ("Secretary") hereby grants a request for a short-supply allowance for 130 metric tons of certain mirror-polished stainless steel sheet with non-directional, unbroken mirror finish for the period October 1991 through March 1992 under paragraph 8 of the Arrangement Between the Government of Japan and the Government of the United States of America Concerning Trade in Certain Steel Products ("the U.S.-Japan Arrangement").

EFFECTIVE DATE: September 12, 1991.

FOR FURTHER INFORMATION CONTACT: Kathy McNamara or Richard O. Weible, Office of Agreements Compliance, Import Administration, U.S. Depart of Commerce, room 7866, Pennsylvania Avenue and 14th Street NW., Washington, DC 20230, (202) 377-1390 or (202) 377-0159.

SUPPLEMENTARY INFORMATION: On August 28, 1991, the Secretary received an adequate short-supply petition from Clark Metals, Inc. ("Clark") requesting 130 metric tons of certain mirror-polished stainless steel sheet with a non-directional, unbroken mirror finish under paragraph 8 of the U.S.-Japan Steel Arrangement. Clark alleges that no U.S. producers produce this material and that regular export licenses are unavailable for this product during this period.

The Secretary conducted this short-supply review pursuant to Section 4(b)(3)(A) of the Steel Trade Liberalization Program Implementation Act, Public Law No. 101-221, 103 Stat. 1866 (1989) ("the Act"), and § 357.102 of the Department of Commerce's Short-Supply Procedures, 19 CFR 356.102 ("Commerce's Short-Supply Procedures").

The requested material meets the following specifications:

Raw Material Specifications

UNS Designation: S30400 (Class 1) (Superceded AISI 304).

Pinholes—Not more than 3 pinholes of not larger than 0.08mm in 300 square meters.

Slivers—Not more than 3 slivers of not longer than 10mm in one square meter.

Finish

Finish Code "Super No. 8" (non-directional, unbroken mirror) Surface Roughness—Rmax 0.07-0.09 micron meter.

Chemical Composition

	Min.	Max.
Carbon		0.08
Manganese		2.00
Phosphorus		0.045
Sulfur		0.030
Silicon		1.00
Chromium	18.0	20.00
Nickel	8.0	10.50

Dimensions

Thickness—0.8-6.0mm

Width—1,524mm (5 feet) (max.)

Length— 4,500mm (14 feet 8 inches) (max.)

Tolerances

Thickness—under 3/16 inch

Width—1/16 inch over, 0 under

Length—1/4 inch over, 0 under

Camber—1/8 inch

Action

On August 28, 1991, the Secretary established an official record on this short-supply request (Case No. 57) in the Central Records Unit, room B-099, Import Administration, U.S. Department of Commerce at the above address. Section 4(b)(4)(B)(i) of the Act and § 357.106(b)(1) of Commerce's Short Supply Procedures require the Secretary to apply a rebuttable presumption that a product is in short supply and to make a determination with respect to a short-supply petition not later than the 15th day after the petition is filed if the Secretary finds that one of the following conditions exists: (1) The raw steelmaking capacity utilization in the United States equals or exceeds 90 percent; (2) the importation of additional quantities of the requested steel product was authorized by the Secretary during each of the two immediately preceding years; or (3) the requested steel product is not produced in the United States. The Secretary found that the requested product is not produced in the United States. Therefore, the Secretary has applied a rebuttable presumption that this product is presently in short supply in accordance with section 4(b)(4)(B)(i)(III) of the Act and § 357.106(b)(1)(iii) of Commerce's Short Supply Procedures. Unless domestic steel producers provided proof that they could and would produce and/or supply the requested quantity of this product within the desired period of time, provided it represented a normal order-to-delivery period, the Secretary would issue a short-supply allowance not later than September 12, 1991.

On September 4, the Secretary published a notice in the **Federal Register** announcing this review and soliciting comments from interested parties. Comments were required to be received no later than September 11, 1991. Comments were received from Polished Metals, Inc. ("Polished Metals") and the Coshoctin Stainless Division of Cyclops Corporation ("Coshoctin Division"). Polished Metals commented that "[w]hile we can not meet the exact specification furnished by Clark Metals because of the limitation on "pinholes and slivers," the product we produce is an acceptable substitute." Coshoctin Stainless commented that, while it does not produce this material, it believes several domestic service centers have polishing facilities and therefore there is sufficient capacity domestically to meet Clark's needs. Coshoctin Stainless mentioned one polisher in particular. We attempted to contact this polisher, but received no response.

Analysis

Because this review was conducted under the 15-day guidelines there is a rebuttable presumption of short supply. One domestic producer, Polished Metals, has stated that it cannot meet Clark's exact specifications, but has attempted to rebut the presumption of short supply by offering what it states is an "acceptable substitute." Therefore, the key issue in this review is whether Clark's specifications are reasonable, or whether the polished sheet available domestically is an adequate substitute product for the intended applications.

Concerning the reasonableness of the specifications, the House Report to the Act states that the Secretary is to:

> consider only those specifications which the Secretary deems to be reasonable using objective standards of commercial custom and usage. On the one hand the Committee does not intend for petitioners to concoct bogus specifications for the purpose of artificially creating short supply conditions.

On the other hand the Committee does not intend for the Secretary to "second guess" market demand or force steel users to purchase inadequate or inferior steel. The Secretary should focus on whether the specification is commercially significant. (H.R. No. 101–263, 101st Cong., 1st Sess. at 14.)

Clark states that it has previously attempted to meet customers needs with steel polished in the United States. However, Clark asserts that "fabricators and contractors rejected dozens of mirror finished stainless stell shipments sourced by Clark from U.S. polishers." Clark also submitted letters from numerous customers stated that they require super No. 8 material for certain applications and that the domestically produced No. 8 material is not acceptable for these applications. Thus, Clark has demonstrated that the regular No. 8 product available domestically is not considered by its customers to be an acceptable substitute.

Clark has also shown that the price of the super No. 8 exceeds the price of the domestically available No. 8 sheet by approximately 30 percent. Although Polished Metals has asserted that it produces an acceptable substitute and that its customers have determined that its product is acceptable, Polished Metals does not refute Clark's customers' statements that they require super No. 8 material for specific applications. Therefore, the Secretary can only conclude that Clark's specifications are reasonable. Because no domestic producer can produce a product that meets those specifications, the presumption of short supply has not been rebutted.

Conclusion

The Secretary has determined that the No. 8 product available domestically is not an adequate substitute for Clark's needs. Therefore, the presumption of short supply has not been rebutted. The Secretary hereby grants, pursuant to section 4(b)(4)(A) of the Act and § 357.102 of Commerce's Short-Supply Procedures, an allowance for 130 metric tons of the requested mirror-polished stainless steel sheet for the period October 1991 through March 1992.

Dated: September 12, 1991.

Marjorie A. Chorlins,

Acting Assistant Secretary for Import Administration.

[FR Doc. 91–22638 Filed 9–18–91; 8:45 am]

BILLING CODE 3510–DS–M

National Institute of Standards and Technology

Improving Acceptance of U.S. Products in International Markets; Opportunity for Interested Parties To Attend and Observe

AGENCY: National Institute of Standards and Technology Commerce.

ACTION: Notice of workshop.

SUMMARY: This is to advise the public that the National Institute of Standards and Technology (NIST) is cosponsoring a Mobile Off-highway Machinery and Lifting Equipment Workshop with the Equipment Manufacturers Institute (EMI). This is the fourth in a series of workshops designed to gather information, insights, and comments to determine conformity assessment related activities of: Declaration of conformity, application of the "CE" mark, technical construction file, requirements for type-examination and notified body responsibilities, (including the testing, certification, accreditation and quality assessment aspects) in which the U.S. Government can assist U.S. industry in gaining product acceptance within other markets such as the European Community (EC).

DATES AND LOCATION: The workshop will be held on Tuesday, November 12, 1991, from 9:30 a.m. to 3:30 p.m. in the main auditorium of the U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230.

FOR FURTHER INFORMATION CONTACT: Dr. Stanley I. Warshaw, Director, Office of Standards Services, National Institute of Standards and Technology, Administration Building, room A–603, Gaithersburg, MD 20899; telephone 301–975–4000, FAX 301–963–2871.

SUPPLEMENTARY INFORMATION: Consistent with the growing importance of international standardization and conformity assessment to the United States private and public sector interests, NIST is cosponsoring a Mobile Off-highway Machinery and Lifting Equipment Workshop with EMI to solicit views and recommendations on how the U.S. Government can assist the Mobile Off-highway Machinery and Lifting Equipment sector of U.S. industry in gaining product acceptance within international markets such as the EC.

Topics for discussion at the workshop are listed below.

1. Which EC requirements for conformity assessment are applicable to Mobile Off-highway Machinery and Lifting Equipment?

2. What specific tasks are associated with the requirements to attain conformity for Mobile Off-highway Machinery and Lifting Equipment?

3. Do the European regional standards (European Standards Organization—CEN or international standards (ISO) which apply to Mobile Off-highway Machinery and Lifting Equipment differ from U.S. standards?

4. To what extent do you feel that U.S. conformity assessment systems for Mobile Off-highway Machinery and Lifting Equipment are adequate for providing test data or other attestations of conformity by the EC member states?

5. Would Mobile Off-highway Machinery and Lifting Equipment benefit from developing mutual recognition agreements between U.S. laboratories or product certifiers and their EC counterparts?

6. How can the U.S. Government better utilize private sector input when developing official positions with regard to possible negotiations with the EC for Mobile Off-highway Machinery and Lifting Equipment regulations?

7. Should the "CE" mark of conformity be made acceptable in the U.S. marketplace? What are the liability implications of such acceptance?

8. Should U.S. regulatory requirements for Mobile Off-highway Machinery and Lifting Equipment be harmonized with EC requirements?

9. Do Mobile Off-highway Machinery and Lifting Equipment need a recognizable mark of conformity? Is a U.S. mark needed?

The workshop will be held on Tuesday, November 12, 1991, commencing at 9:30 a.m. in the main auditorium, U.S. Department of Commerce, 14th Street and Constitution Avenue NW., Washington, DC 20230. To guarantee space, persons who wish to attend and observe the workshop should submit a notice in writing to Dr. Stanley I. Warshaw, Director, Office of Standards Services, National Institute of Standards and Technology, Administration Building, room A–603, Gaithersburg, MD 20899, FAX 301–963–2871. Requests should contain the person's name, address, telephone and facsimile numbers, and affiliation. Requests should be received by October 25, 1991.

Dated: September 13, 1991.

John W. Lyons,

Director.

[FR Doc. 91–22573 Filed 9–18–91; 8:45 am]

BILLING CODE 3510–13–M

Patent and Trademark Office

Trademark Affairs Public Advisory Committee

AGENCY: Patent and Trademark Office, Commerce.

ACTION: Notice.

SUMMARY: In accordance with section 10(a)(2) of the Federal Advisory Committee Act (Pub. L. 92–463), announcement is made of the open meeting of the Public Advisory Committee for Trademark Affairs.

DATES: The Public Advisory Committee for Trademark Affairs will meet from 10 a.m. until 4 p.m. on October 8, 1991.

PLACE: U.S. Patent and Trademark Office, 2900 Crystal Drive, Arlington, Virginia, in the Conference Room on the Lobby level.

STATUS: The meeting will be open to public observation; seating will be available for the public on a first-come-first-served basis. Members of the public will be permitted to make oral comments of three (3) minutes each. Written comments and suggestions will be accepted before or after the meeting on any of the matters discussed. Copies of the minutes will be available upon request.

MATTERS TO BE CONSIDERED: The agenda for the meeting is as follows:

(1) Finance
(2) Automation
(3) Strategic Planning
(4) Current Trademark Office Practice Issues
(5) International Trademark Law

CONTACT PERSON FOR MORE INFORMATION: For further information, contact Lynne Beresford, Office of the Assistant Commissioner for Trademarks, Building CPK2, room 910, Patent and Trademark Office, Washington, DC 20231. Telephone: (703) 557–7464.

Dated: September 10, 1991.

Harry F. Manbeck, Jr.,

Assistant Secretary and Commissioner of Patents and Trademarks.

[FR Doc. 91–22512 Filed 9–18–91; 8:45 am]

BILLING CODE 3510–16–M

DEPARTMENT OF DEFENSE

Department of the Air Force

Air Force Academy Board of Visitors; Meeting

Pursuant to section 9355, title 10, United States Code, the Air Force Academy Board of Visitors will meet at the Air Force Academy, Colorado Springs, Colorado, October 17–20, 1991. The purpose of the meeting is to consider morale and discipline, the curriculum, instruction, physical equipment, fiscal affairs, academic methods, and other matters relating to the Academy.

This meeting will be closed to the public to discuss matters listed in subsections (2), (4), and (6) of section 552b(c), title 5, United States Code. These closed sessions will include: Panel discussions with groups of cadets and military staff and faculty officers involving personal information and opinions, the disclosure of which would result in a clearly unwarranted invasion of personal privacy. Closed sessions will also include executive sessions involving discussions of personal information, including financial information, and information relating solely to internal personnel rules and practices of the Board of Visitors and the Academy. Meeting sessions will be held in various facilities throughout the cadet area.

For further information, contact Major Wayne Taylor, Headquarters, US Air Force (DPPA), Washington DC 20330–5060, at (703) 697–2919.

Patsy J. Conner,

Air Force Federal Register Liaison Officer.

[FR Doc. 91–22519 Filed 9–18–91; 8:45 am]

BILLING CODE 3910–01–M

Department of the Navy

Government-owned Inventions; Availability for Licensing

AGENCY: Department of the Navy, DOD.

ACTION: Notice of availability of inventions for licensing.

SUMMARY: The inventions listed below are assigned to the United States Government as represented by the Secretary of the Navy and are made available for licensing by the Department of the Navy.

Copies of patent applications cited may be ordered by telephone request to Mr. R. J. Erickson at (703) 696-4001. Request for copies of patent applications must include the patent application serial number. Claims are deleted from the patent application copies to avoid premature disclosure.

DATES: September 19, 1991.

FOR FURTHER INFORMATION CONTACT: Mr. R. J. Erickson, Staff Patent Attorney, Office of the Chief of Naval Research (Code OOCCIP), Arlington, Virginia 22217-5000, telephone (703) 696-4001.

Patent Application 07/486,024: Flow Immunosensor Method and Apparatus; filed 23 February 1990.

Patent Application 07/574,175: Enzymatic Assays Using Superabsorbent Materials; filed 29 August 1990.

Patent Application 07/578,390: Microassay on a Card; filed 7 September 1990.

Patent Application 07/704,744: Detection of Explosives by Nuclear Quadrupole Resonance; filed 23 May 1991.

Patent Application 07/730,722: Detection of Explosive and Narcotics by Low Power Large Sample Volume Nuclear Quadrupole Resonance (NQR); filed 16 July 1991.

Dated: September 10, 1991.

Wayne T. Baucino,

Lieutenant, JAGC, U.S. Naval Reserve, Alternate Federal Register Liaison Officer.

[FR Doc. 91–22583 Filed 9–18–91; 8:45 am]

BILLING CODE 3810–AE–F

DELAWARE RIVER BASIN COMMISSION

Commission Meeting and Public Hearing

Notice is hereby given that the Delaware River Basin Commission will hold a public hearing on Wednesday, September 25, 1991. The hearing will be part of the Commission's regular business meeting which is open to the public and scheduled to begin at 1:30 p.m. in the Ballroom of the University of Delaware's Goodstay Center, 2600 Pennsylvania Avenue, Wilmington, Delaware.

An informal conference among the Commissioners and staff will be open for public observation at 9:30 a.m. at the same location and will include a presentation on the Delaware Estuary Program as well as discussions of the upper Delaware ice jam project, Scenic Rivers protection proposed rules, and retail water pricing proposal.

The subjects of the hearing will be as follows:

Applications for Approval of the Following Projects Pursuant to Article 10.3, Article 11 and/or Section 3.8 of the Compact

1. *Holdover Project: Knights Bridge Corporation D–90–54.* A sewage treatment plant (STP) expansion project to increase the capacity of the existing STP from 0.045 million gallons per day (mgd) to 0.09 mgd, to serve the growing commercial development of the Villages at Painter's Crossing. The STP is located about 1000 feet northwest of the U.S. Rt. 1 and Rt. 202 intersection and will continue to discharge treated effluent at its outfall on an unnamed tributary to

Harvey Run, a tributary of Brandywine Creek. The project is in the Township of Birmingham, Delaware County, Pennsylvania. This hearing continues that of August 14, 1991.

2. *Holdover Project: Birmingham Township Sewage Treatment Plant D–91–28 CP.* A sewage treatment plant (STP) project proposed to provide 0.15 mgd tertiary treatment facilities to serve the Township of Birmingham. The STP will be located in Birmingham Township, Chester County, Pennsylvania, just northwest of the intersection of Rt. 202 and Old Wilmington Pike and will discharge to Radley Run approximately 4.5 miles above its confluence with Brandywine Creek. This hearing continues that of August 14, 1991.

3. *Warwick Township Water and Sewer Authority D–79–48 CP.* An application for inclusion of the existing project sewage treatment plant (STP), formerly owned by Warwick Water and Sewer Inc., in the Comprehensive Plan. The STP will be owned and operated by the Warwick Township Water and Sewer Authority. No change in the STP facilities is proposed and it will continue to provide 0.60 mgd of tertiary level treatment to serve the Village of Jamison and other housing developments in portions of Warwick Township. The STP is located south of Valley Road and west of York Road in Warwick Township, Bucks County, Pennsylvania, and will continue to discharge to Fish Creek, a Neshaminy Creek tributary.

4. *Hazleton City Authority D–79–87 CP (Revised).* An application for temporary revision of the passby flow requirement imposed on the Authority's withdrawal from Quakake Creek. The applicant requests relief from conditions "e" and "d" from previously approved dockets D–79–87 CP and D–79–87 CP (Supplement), respectively, which prohibit the withdrawal of surface water from Quakake Creek whenever the streamflow is less than 1.7 mgd. The point of withdrawal is located in Parker Township, Carbon County, Pennsylvania and Quakake Creek is in the Lehigh River Basin.

5. *Keystone Cogeneration Systems, Inc. D–90–48.* A project to construct and operate a 202 MW (net) coal-fired cogeneration facility that will supply steam and electrical energy to the adjacent Monsanto Delaware River Chemical Plant and electricity to Atlantic Electric Company. Up to 3.5 mgd of makeup water for both process and cooling at the plant is proposed to be withdrawn from an offshore intake inside the Delaware State boundary. The project will process and reuse the water so that there will be no wastewater discharge. The project is located west of Route 130, adjacent to the Delaware River and just north of Oldmans Creek in Logan Township, Gloucester County, New Jersey.

6. *Warner Company D–91–26.* An application for approval of a ground water withdrawal project to supply up to 6.23 million gallons (mg)/30 days to the applicant's industrial plant for cooling and processing purposes. The project is located in East Whiteland Township, Chester County, in the Southeastern Pennsylvania Ground Water Protected Area.

7. *Connaught Laboratories, Inc. D–91–31.* An application for approval of a ground water withdrawal project to supply up to 6.0 mg/30 days of water to the applicant's industrial facility from Well Nos. 1 and 2, and to limit the withdrawal from all wells to 6.0 mg/30 days. The project is located in Pocono Township, Monroe County, Pennsylvania.

8. *Public Service Electric & Gas Company (PSE&G), D–91–54.* An application for approval of an industrial wastewater treatment plant (IWTP) modification project that will serve the PSE&G Burlington Generating Station. PSE&G proposes to construct additional treatment facilities to improve the operating efficiency of the existing IWTP with no increase in the existing average discharge flow of 0.2 mgd. The IWTP will continue to discharge to the Delaware River via a man-made discharge channel located on the plant site in the City of Burlington, Burlington County, New Jersey.

Documents relating to these items may be examined at the Commission's offices. Preliminary dockets are available in single copies upon request. Please contact George C. Elias concerning docket-related questions. Persons wishing to testify at this hearing are requested to register with the Secretary prior to the hearing.

Dated: September 10, 1991.

Susan M. Weisman,

Secretary.

[FR Doc. 91–22529 Filed 9–18–91; 8:45 am]

BILLING CODE 6360–01–M

DEPARTMENT OF EDUCATION

National Council on Education Standards and Testing; Amendment to Notice of Meeting

AGENCY: National Council on Education Standards and Testing; Education.

ACTION: Amendment to notice of meeting.

SUMMARY: This is an amendment to the notice of the September 23, 1991 meeting of the National Council on Education Standards and Testing that appeared in the **Federal Register** on Thursday, September 5, 1991, Vol. 56, p. 43911. Under the authority of 10(d) of the Federal Advisory Committee Act 5 U.S.C. 552b(c), a portion of the meeting, from 12 p.m. to 1:30 p.m., will be closed to the public. During the closed session, the council will meet with representatives from the National Assessment of Educational Progress (NAEP) to discuss and review NAEP objectives and framework, including a discussion of individual test items that will actually be administered to school children. Test security requires that the items not be publicly available in order to maintain the reliability and validity of the National Assessment of Educational Progress. Premature disclosure of the individual test items from NAEP would significantly frustrate implementation of NAEP. Such matters are protected by exemption 9(B) of section 552b(c) of title 5 U.S.C. There are no other changes to the previous announcement.

Diane Ravitch,

Assistant Secretary, Educational Research and Improvement.

[FR Doc. 91–22507 Filed 9–18–91; 8:45 am]

BILLING CODE 4000–01–M

DEPARTMENT OF ENERGY

Morgantown Energy Technology Center Financial Assistance Award (Grant Renewal)

AGENCY: Morgantown Energy Technology Center, Department of Energy (DOE).

ACTION: Notice of noncompetitive financial assistance award.

SUMMARY: Based upon a determination made pursuant to 10 CFR 600.7(b)(2)(i) (A) and (B) the DOE, Morgantown Energy Technology Center, gives notice of its plans to award a renewal under Grant No. DE–FG21–91MC28197, to South Carolina Energy Research & Development Center, Clemson University, Clemson, South Carolina, in the amount of $68,217, of which $35,177 will be funded by the Government.

FOR FURTHER INFORMATION CONTACT: D. Denise Riggi, I–07, U.S. Department of Energy, Morgantown Energy Technology Center, P.O. Box 880, Morgantown, West Virginia 26507–0880, telephone (304) 291–4241, Procurement Request No. 21–91MC28197.501.

SUPPLEMENTARY INFORMATION: The pending award is based on a renewal

application for co-sponsoring of a workshop, scheduled for October 28, 29, and 30, 1991, related to gas turbine research technology, with the purpose of (1) framing the technological issues which must be resolved so that the potential contributions may be realized; (2) defining the research and development needs which are suitable for the types of research performed by educational gas turbines; and (3) fostering improved coordination and relevance of industry/educational/ government research and development activities. The goals of the workshop are consistent with the DOE's mission to utilize domestic energy resources, and the DOE's support of this activity will enhance the public benefit by the earlier dissemination of information to the general public.

Dated: September 6, 1991.

Louie L. Calaway,

Director, Acquisition and Assistance Division, Morgantown Energy Technology Center.

[FR Doc. 91-22610 Filed 9-18-91; 8:45 am]

BILLING CODE 6450-01-M

Federal Energy Regulatory Commission

[Docket Nos. ER91-581-000, et al.]

Northern States Power Co. et al.; Electric Rate, Small Power Production, and Interlocking Directorate Filings

Take notice that the following filings have been made with the Commission:

1. Northern States Power Company (Minnesota)

[Docket No. ER91-581-000]

September 11, 1991.

Take notice that on September 3, 1991, Northern States Power Company (Minnesota) tendered for filing a Notice of Termination of non-firm transmission service for Citizens Power & Light Corporation.

Comment date: September 24, 1991 in accordance with Standard Paragraph E at the end of this notice.

2. United Illuminating Company

[Docket No. ER91-625-000]

September 12, 1991.

Take notice that on September 30, 1991, United Illuminating Company, (UI) tendered for filing a rate schedule for a coordination transaction involving the sale of capacity entitlements to Citizens Utilities Company (Citizens). The sales are pursuant to an agreement under which service commenced November 1, 1990. Under the agreement, UI will sell capacity entitlements in part from New Haven Harbor Station (NHHS) and in part from UI's system capacity. Capacity charges are fixed, but increase each year of the agreement. UI requests the Commission to accept all of the rates specified in the agreement so that UI will be permitted to charge the increased capacity charges without further filing with the Commission.

Copies of the filing were served upon Citizens and on the Vermont Public Service Board.

Comment date: September 26, 1991, in accordance with Standard Paragraph E at the end of this notice.

3. Central Louisiana Electric Company, Inc.

[Docket No. ER90-39-004]

September 12, 1991.

Take notice that on September 9, 1991, Central Louisiana Electric Company, Inc. tendered for filing its compliance filing in this docket pursuant to the Commission's order issued July 26, 1991.

Comment date: September 26, 1991, in accordance with Standard Paragraph E at the end of this notice.

4. Southeastern Power Administration

[Docket No. EF91-3041-000]

September 12, 1991.

Take notice that on September 4, 1991, the Assistant Secretary, Conservation and Renewable Energy, of the Department of Energy confirmed and approved, on an interim basis effective midnight September 30, 1991, Rate Schedules KP-1-D, JHK-2-B, JHK-3-B, and PH1-B for power from Southeastern Power Administration's (Southeastern) Kerr-Philpott Projects. The approval extends through September 30, 1996. The Commission, by order issued January 23, 1987, in Docket No. EF87-3041, confirmed and approved Rate Schedules KP-1-C, JHK-2-A, JHK-3-A, and PH-1-A through September 30, 1991.

Southeastern proposes in the instant filing to replace Rate Schedules KP-1-C, JHK-2-A, JHK-3-A, and PH-1-A with Rate Schedules KP-1-D, JHK-2-B, JHK-3-B, and PH1-B, respectively. The rate increase is due primarily to increased operation and maintenance expenses of the Corps of Engineers at the projects. The rate schedules are submitted for confirmation and approval on a final basis pursuant to authority vested in the Commission by Delegation Order No. 0204-108. Approval is requested for a period ending September 30, 1996.

Comment date: September 30, 1991 in accordance with Standard Paragraph E at the end of this notice.

5. Central Maine Power Company

[Docket No. ER91-292-000]

September 12, 1991.

Take notice that on September 6, 1991, Central Maine Power Company (CMP), tendered for filing the following rate schedule in the above referenced docket:

Second Amendment to Transmission Service Agreement between Central Maine Power Company and Boston Edison Company (BECO) dated June 1, 1990.

This filing amends the Transmission Service Agreement between CMP and BECO dated as of November 1, 1990, filed with the Commission by CMP on March 4, 1991, by reducing the rate for transmission furnished to BECO from $15.02 per kw-yr to $10.22 for kw-yr for the period June 1, 1991 through October 31, 1991.

In addition, CMP has tendered for filing the following Notices of Termination:

Notice of Termination effective October 31, 1990 pertaining to the Transmission Contract between CMP and BECO dated October 30, 1981 (CMP Rate Schedule FERC No. 66).

Notice of Termination effective October 31, 1991, pertaining to the Transmission Service Agreement dated November 1, 1990, as amended.

CMP requests that the Commission waive its notice and filing requirements so as to permit the Notices of Termination and the November, 1990 Transmission Service Agreement, as amended, to become effective in accordance with their terms.

CMP has served a copy of the filing on the affected customer and on the Maine Public Utilities Commission.

Comment date: September 26, 1991, in accordance with Standard Paragraph E at the end of this notice.

Standard Paragraphs

E. Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with rules 211 and 214 of the Commission's Rules of Practice and Procedure (18 CFR 285.211 and 385.214). All such motions or protests should be filed on or before the comment date. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the

Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 91-22553 Filed 9-18-91; 8:45 am]

BILLING CODE 6717-01-M

[Project No. 11055-000 New Hampshire]

Wilton Hydro Electric Co., Inc.; Declaring Application Ready for Environmental Analysis

September 12, 1991.

Take notice that the application for license for the Wilton Hydro Electric Project No. 11055, is ready for environmental analysis and comments are sought on the merits of the application.

The Commission directs, pursuant to § 4.34(b) of the regulations (see Order No. 533 issued May 8, 1991, 56 FR 23108 (May 20, 1991)), that all comments, recommendations, terms and conditions and prescriptions concerning the application be filed with the Commission by the comment date specified in this notice (including mandatory and recommended terms and conditions or prescriptions pursuant to sections 4(e), 18, 30(c) of the Federal Power Act (FPA), and section 405(d) of the Public Utility Regulatory Policies Act, the Fish and Wildlife Coordination Act, the National Historic Preservation Act, the National Environmental Policy Act, the Historical and Archeological Preservation Act, and other applicable statutes). All reply comments must be filed with the Commission within 45 days from the comment date in this notice.

Comment date: November 12, 1991.

All filings must: (1) Bear in all capital letters the title "COMMENTS," "REPLY COMMENTS," "RECOMMENDATIONS," "TERMS AND CONDITIONS," OR "PRESCRIPTIONS;" (2) set forth in the heading the name of the applicant and the project number of the application to which the filing responds; (3) furnish the name, address and telephone number of the person submitting the filing; and (4) otherwise comply with the requirements of 18 CFR 385.2001 through 385.2005. All comments, recommendations, terms and conditions or prescriptions must set forth their evidentiary basis and otherwise comply with the requirements of 18 CFR 4.34(b). Any of these documents must be filed by providing the original and the number of copies required by the Commission's regulations to: Secretary, Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426. An additional copy must be sent to Director, Division of Project Review, Office of Hydropower Licensing, Federal Energy Regulatory Commission, room 1027, at the above address. Each filing must be accompanied by proof of service on all persons listed on the service list and any affected resource agencies and Indian tribes.

Anyone may obtain an extension of time for these deadlines from the Commission only upon a showing of good cause or extraordinary circumstances in accordance with 18 CFR 385.2008. Requests for additional procedures and replies to such requests may be filed in accordance with 18 CFR 4.34 (a) and (c).

You are advised to contact Ms. Julie Bernt on (202) 219-2814, if you have any questions about this notice.

Lois D. Cashell,

Secretary.

[FR Doc. 91-22544 Filed 9-18-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. CP89-7-017, et al.]

Transcontinental Gas Pipe Line Corp., et al.; Natural Gas Certificate Filings

Take notice that the following filings have been made with the Commission:

1. Transcontinental Gas Pipe Line Corporation

[Docket Nos. CP89-7-017 and CP89-710-007]

September 11, 1991.

Take notice that on September 6, 1991, Transcontinental Gas Pipe Line Corporation (Transco), Post Office Box 1396, Houston, Texas 77251, filed to amend its currently pending petition to amend, so as to amend the certificate authority granted by the Commission in an Order issued September 13, 1990 in Docket No. CP88-171-000 *et al.* By this amendment, Transco is seeking to modify its pending petition to amend by adding one customer to the service list and deleting another, and to make other changes to its construction timetable and rate derivation, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Specifically, Transco proposes to: (1) Provide a firm transportation service of up to 13,700 Mcf per day on behalf of the UGI Corporation (UGI) for a two year term with pre-granted abandonment at the end of the term; (2) withdraw Long Island Cogeneration Limited Partnership from the authorized service; (3) withdraw Transco's request made in its previous petition to shift from 1991 to 1992 the construction of certain facilities authorized in the September 13, 1990, Order; and (4) revise the rates requested in the underlying amendment to reflect the customer addition and the construction schedule revision.

Additionally, Transco requests that the Commission grant the amended authorizations on or before November 1, 1991 so that Transco can enter into the necessary contractual arrangements with UGI and be able to provide service to UGI on a timely basis, to meet the gas supply requirements of UGI's residential markets during this winter's heating season.

Comment date: September 20, 1991, in accordance with the first subparagraph of Standard Paragraph F at the end of this notice.

2. Northwest Pipeline Corporation; United Gas Pipe Line Company; Trunkline Gas Company

[Docket No. CP91-3014-000; Docket No. CP91-3017-000; Docket No. CP91-3018-000; Docket No. CP91-3019-000; Docket No. CP91-3020-000]

September 11, 1991.

Take notice that on September 9, 1991, Applicants filed in the above-referenced dockets prior notice requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on behalf of shippers under the blanket certificates issued to Applicants all as more fully set forth in the requests that are on file with the Commission and open to public inspection.[1]

Information applicable to each transaction, including the identity of the shipper, the type of transportation service, the appropriate transportation rate schedule, the peak day, average day and annual volumes, and the initiation service dates and related ST docket numbers of the 120-day transactions under § 284.223 of the Commission's Regulations, has been provided by Applicants and is summarized in the attached appendix A. Applicants' addresses and transportation blanket certificates are shown in the attached appendix B.

Comment date: October 28, 1991, in accordance with Standard Paragraph G at the end of this notice.

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[1] These prior notice requests are not consolidated.

Docket No. (date filed)	Shipper name (type)	Peak day, average day, annual MMBtu	Receipt points [1]	Delivery points	Contract date, rate schedule, service type	Related docket, start up date
CP91-3014-000 (9-9-91)	Enron Gas Marketing, Inc. (marketer).	25,000 25,000 9,125,000	CO	NM	2-1-91, TF-1, Firm. [2]	ST91-10235-000, 7-1-91.
CP91-3017-000 (9-9-91)	Phoenix Gas Pipeline Company (intrastate pipeline).	103,000 103,000 37,595,000	Various	Various	12-6-88, ITS, Interruptible. [2]	ST91-10189-000, 8-21-91.
CP91-3018-000 (9-9-91)	Pennzoil Gas Marketing Company (marketer).	2,060 2,060 751,900	LA	MS, FL	12-1-90, FTS, Firm. [2]	ST91-10050-000, 8-9-91.
CP91-3019-000 (9-9-91)	Midcon Marketing Corp. (marketer).	72,924 72,924 26,617,260	LA	MS, FL	3-26-90, FTS, Firm. [2]	ST91-10007-000, 8-5-91.
CP91-3020-000 (9-9-91)	Clinton Gas Transmission, Inc. (marketer).	5,000 5,000 [3] 1,825,000	OLA, OTX, TX, IL, LA, TN.	IL	7-24-91, PT, Interruptible.	ST91-10059-000, 8-1-91.

[1] Offshore Louisiana and offshore Texas are shown as OLA and OTX.
[2] As amended.
[3] Trunkline's quantities are in Mcf.

Applicant's address	Blanket docket
Northwest Pipeline Corporation, 295 Chipeta Way, Salt Lake City, Utah 84108	CP86-578-000
Trunkline Gas Company, P.O. Box 1642, Houston, Texas 77251-1642	CP86-586-000
United Gas Pipe Line Company, P.O. Box 1478, Houston, Texas 77251-1478	CP88-6-000

3. Northwest Pipeline Corporation

[Docket No. CP91-2949-000]

September 11, 1991.

Take notice that on August 30, 1991, Northwest Pipeline Corporation (Northwest), 295 Chipeta Way, Salt Lake City, Utah 84158-0900, filed in Docket No. CP91-2949-000 an application pursuant to section 7(b) of the Natural Gas Act for permission and approval to abandon gas gathering and transportation services provided for Southwest Gas Corporation (SWG) and Paiute Pipeline Company (Paiute), all as more fully set forth in the application which is on file with the Commission and open to public inspection.

Northwest states that it provides a gathering and transportation service to SWG and Paiute pursuant to its Rate Schedules X-55 and X-56 which incorporate gas gathering and transportation agreements. Northwest indicates that it and SWG have agreed to terminate the agreements effective June 15, 1991. It is stated that no facilities would be abandoned in conjunction with the abandonment of the service.

Northwest states further that the termination agreements are contingent upon retention of the existing X-55/X-56 priority of service for a replacement open-access transportation agreement with SWG dated June 1, 1991. It is said that Northwest is also requesting any necessary waivers of the first-come, first-serve provisions of its tariff to allow September 12, 1978, the priority of service date previously established for Rate Schedules X-55 and X-56, to be the priority of service date for the replacement transportation agreement.

Comment date: October 2, 1991, in accordance with Standard Paragraph F at the end of this notice.

4. CNG Transmission Corporation

[Docket No. CP91-2989-000]

September 11, 1991.

Take notice that on September 5, 1991, CNG Transmission Corporation (CNG), 445 West Main Street, Clarksburg, West Virginia 26301, filed in Docket No. CP91-2989-000, an application pursuant to section 7(c) of the Natural Gas Act to construct and operate natural gas transmission facilities in order to provide firm transportation services on behalf of Seneca Power Partners, L.P. (Seneca) under Rate Schedule TF, all as more fully set forth in the application which is on file with the Commission and open to public inspection.

CNG states that Seneca is currently constructing the O-AT-KA Cogeneration Project (Cogen Project), a 54-megawatt facility in Batavia, Genessee County, New York, on a parcel of land purchased from and adjacent to the O-AT-KA Milk Products Cooperative (Cooperative). CNG states that the Cogen Project would cogenerate steam and electricity: The steam would be delivered to the Cooperative for its use, the electricity is under contract to be sold to Niagara Mohawk Power Corporation. CNG requests authority to transport gas on a firm basis for Seneca.

CNG's proposed service involves transporting maximum annual and daily volumes of 4,562,000 and 12,500 dt, respectively. CNG would retain fuel gas as provided under Rate Schedule TF. CNG would then deliver 12,500 dt per day to Seneca at a proposed interconnection between the facilities of CNG and Seneca near the town of LeRoy in Genessee County, New York, for use in the Cogen Project.

In order to provide the service CNG proposes to construct and operate the following facilities: 4.3 miles of 24-inch pipeline looping in Wetzel County, West Virginia; 5.3 miles of 8-inch pipeline in Genessee County, New York; and a metering and regulating station in Genessee County, New York. Estimated cost of construction of these facilities is approximately $5.8 million, with Seneca providing a contribution in aid of $1.1 million, with the balance being financed from funds on hand or obtained from CNG's parent company, Consolidated Natural Gas Company.

Comment date: October 2, 1991, in accordance with Standard Paragraph F at the end of the notice.

5. Southern Natural Gas Company, Southern Natural Gas Company, Northwest Pipeline Corporation, Northwest Pipeline Corporation, Northwest Pipeline Corporation

[Docket No. CP91-2998-000; Docket No. CP91-2999-000; Docket No. CP91-3000-000; Docket No. CP91-3001-000; Docket No. CP91-3002-000]

September 11, 1991.

Take notice that on September 6, 1991, Southern Natural Gas Company, P.O.

Box 2563, Birmingham, Alabama 35202–2563, and Northwest Pipeline Corporation, 295 Chipeta Way, Salt Lake City, Utah 84108, (Applicants) filed in the above-reference dockets prior notice requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on behalf of shippers under the blanket certificates issued in Docket No. CP88–316–000 and Docket No. CP86–578–000, respectively, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the requests that are on file with the Commission and open to public inspection.[2]

Information applicable to each transaction, including the identity of the shipper, the type of transportation service, the appropriate transportation rate schedule, the peak day, average day and annual volumes, and the initiation service dates and related ST docket numbers of the 120-day transactions under § 284.223 of the Commission's Regulations, has been provided by Applicants and is summarized in the attached appendix.

Comment date: October 28, 1991, in accordance with Standard Paragraph G at the end of this notice.

[2] These prior notice requests are not consolidated.

Docket No. (date filed)	Shipper name (type)	Peak day, average day, annual MMBtu	Receipt points	Delivery points	Contract date, rate schedule, service type	Related docket, start up date
CP91-2998-000 (9-6-91)	Petroleum Source & Systems Group (marketer).	8,000 6,849 2,500,000	Off LA, Off TX, TX, LA, MS, AL.	GA, TN	7-9-91, IT, Interruptible.	ST91-9695-000, 7-10-91.
CP91-2999-000 (9-6-91)	Brown Wood Preserving Co., Inc. (end-user).	1,000 1,000 365,000	Off LA, Off TX, TX, LA, MS, AL.	AL	6-20-91, IT, Interruptible.	ST91-9686-000, 7-10-91.
CP91-3000-000 (9-6-91)	Bonneville Fuels Marketing Corporation (marketer).	2,400 2,400 876,000	CO	NM	2-1-91, TF-1, Firm	ST91-10236-000, 7-1-91.
CP91-3001-000 (9-6-91)	Arco Natural Gas Marketing, Inc. (marketer).	70,000 70,000 25,550,000	CO	NM	2-1-91, TF-1, Firm	ST91-10238-000, 7-1-91.
CP91-3002-000 (9-6-91)	Williams Gas Marketing company (marketer).	100,000 100,000 36,500,000	CO	NM	2-1-91, TF-1, Firm	ST91-10237-000, 7-1-91.

6. Williams Natural Gas Company

September 11, 1991.

[Docket No. CP91–2841–000]

Take notice that on August 21, 1991, Williams Natural Gas Company (WNG), P.O. Box 3288, Tulsa, Oklahoma 74101, filed in Docket No. CP91–2841–000 a request, as supplemented on September 9, 1991, pursuant to §§ 157.205 and 157.216(b) of the Federal Energy Regulatory Commission's (Commission) Regulations under the Natural Gas Act for authorization to abandon in place any by reclaim approximately 3.9 miles of 16-inch and 20-inch pipeline and appurtenant facilities, all in Sedgwick County, Kansas, and the transportation of gas through said facilities, under the blanket certificate issued in Docket No. CP82–479–000 pursuant to section 7 of the Natural Gas Act, all as more fully set forth in request on file with the Commission and open to public inspection.

WNG states that there are currently three domestic customers, a trailer park clubhouse and Arkla Energy Resources (Arkla) emergency exchange point located on the low pressure pipeline proposed to be abandoned. WNG further states that except for Arkla these customers have agreed to the abandonment and that Arkla will continue to receive service from an existing pipeline in the area. The reclaim cost is estimated to be $16,885 and the salvage value is $0.

Comment date: October 28, 1991, in accordance with Standard Paragraph G at the end of this notice.

7. Equitrans, Inc., United Gas Pipe Line Company, Equitrans, Inc., Equitrans, Inc., Columbia Gulf Transmission Company, Columbia Gas Transmission Corporation, Columbia Gas Transmission Corporation

[Docket No. CP91–3003–000, Docket No. CP91–3004–000, Docket No. CP91–3005–000, Docket No. CP91–3006–000, Docket No. CP91–3007–000, Docket No. CP91–3008–000, Docket No. CP91–3009–000]

September 12, 1991.

Take notice that on September 6, 1991, Applicants filed in the above-referenced dockets prior notice requests pursuant to § 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on behalf of shippers under the blanket certificates issued to Applicants all as more fully set forth in the requests that are on file with the Commission and open to public inspection.[3]

Information applicable to each transaction, including the identity of the shipper, the type of transportation service, the appropriate transportation rate schedule, the peak day, average day and annual volumes, and the initiation service dates and related ST docket numbers of the 120-day transactions under § 284.223 of the Commission's Regulations, has been provided by Applicants and is summarized in the attached appendix A. Applicants' addresses and transportation blanket certificates are shown in the attached appendix B.

Comment date: October 28, 1991, in accordance with Standard Paragraph G at the end of this notice.

[3] These prior notice requests are not consolidated.

Docket No. (date filed)	Shipper name (type)	Peak day, average day, annual MMBTu	Receipt points	Delivery points	Contract date, rate schedule, service type	Related docket, start up date
CP91-3003-000 (9-6-91)	Equitable Gas Co.	4,528 2,594 80,414	PA, WV	PA, WV	8-1-91, ITS, Interruptible.	ST91-10150-000, 8-1-91.
CP91-3004-000 (9-6-91)	Stella Gas Co. (Marketer).	51,500 51,500 18,797,500	Off TX	Off TX	7-25-91, ITS, Interruptible.	ST91-09956-000, 8-1-91.
CP91-3005-000 (9-6-91)	Equitable Gas Co	38,740 31,667 981,677	PA, WV	PA, WV	8-1-91, ITS, Interruptible.	ST91-10152-000, 8-1-91.
CP91-3006-000 (9-6-91)	Equitable Gas. Co	29,055 28,803 892,893	PA, WV	PA, WV	8-1-91, ITS, Interruptible.	ST91-10151-000, 8-1-91.
CP91-3007-000 (9-6-91)	Bishop Pipeline Corp. (Marketer).	275,000 220,000 80,300,00	LA, Off, LA, TX	LA, TX	7-25-88 [1], ITS-2, Interruptible.	ST91-10106-000, 7-26-91.
CP91-3008-000 (9-6-91)	Manville Sales Corp. (End-user).	3,000 2,400 1,095,000	KY, OH, WV, PA, NY, VA, MD, NJ.	OH	7-8-91, ITS, Interruptible.	ST91-9758-000, 7-1-91.

[1] As amended 8-24-90 and 6-25-91.

8. Trunkline Gas Company

[Docket Nos. CP91-3021-000, CP91-3022-000, CP91-3023-000, CP91-3024-000]

September 12, 1991.

Take notice that on September 9, 1991, Trunkline Gas Company (Trunkline), P.O. Box 1642, Houston, Texas 77251-1642, filed in the above-referenced dockets prior notice requests pursuant to §§ 157.205 and 284.223 of the Commission's Regulations under the Natural Gas Act for authorization to transport natural gas on behalf of shippers under its blanket certificate issued in Docket No. CP86-586-000, pursuant to section 7 of the Natural Gas Act, all as more fully set forth in the requests that are on file with the Commission and open to public inspection.[4]

Information applicable to each transaction, including the identity of the shipper, the type of transportation service, the appropriate transportation rate schedule, the peak day, average day and annual volumes, and the initiation service dates and related ST docket numbers of the 120-day transactions under § 284.223 of the Commission's Regulations, has been provided by Trunkline and is summarized in the attached appendix.

Comment date: October 28, 1991, in accordance with Standard Paragraph G at the end of this notice.

[4] These prior notice requests are not consolidated.

Docket No. (date filed)	Shipper name (type)	Peak day, average day, annual Mcf	Receipt points	Delivery points	Contract date, rate schedule, service type	Related docket, start up date
CP91-3021-000 (9-9-91)	Hunt Oil Co. (Producer)	30,000 30,000 10,950,000	Off LA, Off TX, IL, LA, TN, TX.	LA	7-6-90, PT, Interruptible.	ST91-10028-000, 8-1-91.
CP91-3022-000 (9-9-91)	Polaris Pipeline Corp. (marketer).	50,000 50,000 18,250,000	Off LA, Off TX, IL, LA, TN, TX.	LA	7-29-91, PT, Interruptible.	ST91-10060-000, 8-1-91.
CP91-3023-000 (9-9-91)	V.H.C. Gas Systems, L.P. (marketer).	200,000 200,000 73,000,000	IN, IL, LA, TN, TX, Off LA, Off TX.	OH	5-28-91, PT, Interruptible.	ST91-10030-000, 8-1-91.
CP91-3024-000 (9-9-91)	Phillips Petroleum Co. (producer).	100,000 100,000 36,500,000	Off LA, Off TX, IL, LA, TN, TX.	IL	7-23-91, PT, Interruptible.	ST91-9959-000, 7-24-91.

Standard Paragraphs

F. Any person desiring to be heard or make any protest with reference to said filing should on or before the comment date file with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.211 and 385.214) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Take further notice that, pursuant to the authority contained in and subject to jurisdiction conferred upon the Federal Energy Regulatory Commission by sections 7 and 15 of the Natural Gas Act and the Commission's Rules of Practice and Procedure, a hearing will be held without further notice before the Commission or its designee on this filing if no motion to intervene is filed within the time required herein, if the Commission on its own review of the matter finds that a grant of the certificate is required by the public convenience and necessity. If a motion for leave to intervene is timely filed, or if the Commission on its own motion believes that a formal hearing is

required, further notice of such hearing will be duly given.

Under the procedure herein provided for, unless otherwise advised, it will be unnecessary for the applicant to appear or be represented at the hearing.

G. Any person or the Commission's staff may, within 45 days after the issuance of the instant notice by the Commission, file pursuant to Rule 214 of the Commission's Procedural Rules (18 CFR 385.214) a motion to intervene or notice of intervention and pursuant to § 157.205 of the Regulations under the Natural Gas Act (18 CFR 157.205) a protest to the request. If no protest is filed within the time allowed therefore, the proposed activity shall be deemed to be authorized effective the day after the time allowed for filing a protest. If a protest is filed and not withdrawn within 30 days after the time allowed for filing a protest, the instant request shall be treated as an application for authorization pursuant to section 7 of the Natural Gas Act.

Lois D. Cashell,

Secretary.

[FR Doc. 91-22554 Filed 9-18-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. TQ92-1-1-001 and TM92-1-1-001]

Alabama-Tennessee Natural Gas Co.; Proposed PGA Adjustment

September 12, 1991.

Take notice that on September 9, 1991, Alabama-Tennessee Natural Gas Company (Alabama-Tennessee), Post Office Box 918, Florence, Alabama 35631, tendered for filing as part of its FERC Gas Tariff, First Revised Volume No. 1, the following tariff sheets:

Substitute Twenty Seventh Revised Sheet No. 4
Substitute Third Revised Sheet No. 4B

The tariff sheets are proposed to become effective October 1, 1991. Alabama-Tennessee states that the purpose of this filing is to make certain computational corrections to its filing made in the above-captioned docket on September 3, 1991, to conform to the rates of its suppliers. Alabama-Tennessee further states that this filing is being made in order to adjust its rates and to reflect the Commission's Annual Charge Adjustment (ACA) effective on October 1, 1991.

Alabama-Tennessee has requested any necessary waivers of the Commission's Regulations in order to permit the tariff sheets to become effective as proposed.

Alabama-Tennessee states that copies of the tariff filing have been mailed to all of its jurisdictional sales and transportation customers and affected State Regulatory Commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before September 19, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 91-22548 Filed 9-18-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM92-1-84-000]

Caprock Pipeline Co.; Proposed Changes in FERC Gas Tariff

September 12, 1991.

Take notice that on September 10, 1991, Caprock Pipeline Company (Caprock Pipeline) tendered for filing the following revised sheets to its FERC Gas Tariff, Revised Original Volume No. 3:

Fifth Revised Sheet No. 4
Fifth Revised Sheet No. 5

Caprock Pipeline requests an effective date of October 1, 1991 for the proposed tariff sheets.

Caprock Pipeline states that the purpose of these changes is to establish the Annual Charge Adjustment (ACA) surcharge in its rates for fiscal year 1991.

Caprock Pipeline states that a copy of the filing has been served upon all of Caprock Pipeline's customers.

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with 18 CFR 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before September 19, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the public reference room.

Lois D. Cashell,

Secretary.

[FR Doc. 91-22551 Filed 9-18-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM92-2-21-000]

Columbia Gas Transmission Corporation; Proposed Changes in FERC Gas Tariff

September 12, 1991.

Take notice that Columbia Gas Transmission Corporation (Columbia) on September 6, 1991 tendered for filing the following proposed changes to its FERC Gas Tariff, First Revised Volume No. 1:

To Be Effective October 9, 1991

Second Revised Sheet No. 30C05
Second Revised Sheet No. 30C06
First Revised Sheet No. 30D01
First Revised Sheet No. 30D02
Second Revised Sheet No. 30D05
Second Revised Sheet No. 30D06
Second Revised Sheet No. 30D07
Second Revised Sheet No. 30D08

By this filing, Columbia proposes (1) to flow through a decrease in the refund amount due from Texas Eastern Transmission Corporation (Texas Eastern) pursuant to Texas Eastern's Docket No. TM91-10-17-000; (2) to flow through an increase in the refund amount due from Texas Eastern in its Docket No. TM91-11-17-000; and (3) to refile tariff sheets included in Columbia's August 9, 1991 filing: (i) To correct over/under amounts in regard to Texas Gas' Docket No. RP89-208; and (ii) to revise the allocation factors and flowthrough amounts to incorporate converted firm transportation volumes which were omitted in Columbia's previous flowthrough of Texas Eastern Docket No. TM91-7-17.

Columbia states that copies of the filing were served upon Columbia's jurisdictional customers, interested state commissions and upon each person on the official service list in Docket Nos. RP88-187, *et al.* and RP91-41, *et al.*

Any person desiring to be heard or to protest said filing should file a motion to intervene or protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with 18 CFR 385.214 and 385.211 of the Commission's Rules and Regulations. All such motions or protests should be filed on or before September 19, 1991. Protests will be

considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Any person wishing to become a party must file a motion to intervene. Copies of this filing are on file with the Commission and are available for public inspection in the public reference room.

Lois D. Cashell,

Secretary.

[FR Doc. 91-22545 Filed 9-18-91; 8:45 am]

BILLING CODE 6717-01-M

[Project No. 2590-001-Wisconsin]

Consolidated Water Power Co.; Establishing Procedures for Relicensing and a Deadline for Submission of Final Amendments

September 12, 1991.

The license for the Wisconsin River Division Project No. 2590, located on the Wisconsin River, Portage County, Wisconsin, expires on June 30, 1993. The statutory deadline for filing an application for new license was June 30, 1991. An application for new license has been filed as follows:

Project No.	Applicant	Contact
2590-001	Consolidated Water Power Company, 231 First Avenue North, P.O. Box 8050, Wisconsin Rapids, WI 54495.	Mr. Kenneth K. Knapp, Consolidated Water Power Company, 231 First Avenue North, P.O. Box 8050, Wisconsin Rapids, WI 54495 (715) 422-3073.

The following is an approximate schedule and procedures that will be followed in processing the application:

Date	Action
Aug. 30, 1991	Commission notified applicant that its application has been accepted.
Sept. 16, 1991	Commission issues public notice of the accepted application establishing date for filing motions to intervene and protests.
Nov. 16, 1991	Commission's deadline for applicant for filing a final amendment, if any, to its application.

Upon receipt of any additional information and any information filed in response to public notices of the application, the Commission will evaluate the application in accordance with applicable statutory requirements and take appropriate action on the application.

Any questions concerning this notice should be directed to Michael Dees at 202-219-2807.

Lois D. Cashell,

Secretary.

[FR Doc. 91-22541 Filed 9-18-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TQ91-7-24-001]

Equitrans, Inc.; Proposed Changes in FERC Gas Tariff

September 12, 1991.

Take notice that Equitrans, Inc. (Equitrans) on September 5, 1991, tendered for filing with the Federal Energy Regulatory Commission (Commission) (1) documentation that Account No. 858 costs are being incurred to avoid higher priced supply; and (2) the following tariff sheet to its FERC Gas Tariff, Original Volume No. 1, effective August 1, 1991:

Substitute First Revised 18 Revised Sheet No. 34

Equitrans states that the foregoing is being filed in compliance with the Commission's Letter Order issued on August 22, 1991 in Docket No. TQ91-7-24-000. The Order directed Equitrans to refile its Tariff Sheet No. 34 to exclude the winter requirement quantity charge from the maximum winter rate for its interruptible sales service and to prepare a workpaper demonstrating that Account No. 858 costs were incurred to avoid purchasing higher priced pipeline supply.

Equitrans states that a copy of its filing has been served upon its purchasers and interested state commissions.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before September 19, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 91-22549 Filed 9-18-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. RP90-164-004 and RP90-165-003]

Mid Louisiana Gas Co.; Compliance Filing

September 12, 1991.

Take notice that on September 6, 1991 Mid Louisiana Gas Company tendered for filing revised tariff sheets implementing the Stipulation and Agreement approved by the Commission in the above referenced proceeding. The proposed effective date is October 1, 1991.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before September 19, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 91-22546 Filed 9-18-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TQ91-6-25-001]

Mississippi River Transmission Corp.; Rate Change Filing

September 12, 1991.

Take notice that on September 9, 1991 Mississippi River Transmission Corporation (MRT) tendered for filing Substitute Sixty-Fourth Sheet No. 4 and Substitute Twenty-Third Revised Sheet No. 4.1 to its FERC Gas Tariff, Second Revised Volume No. 1, to be effective September 1, 1991.

MRT states that on August 1, 1991 it filed its quarterly Purchased Gas Adjustment (PGA) to be effective September 1, 1991 in Docket No. TQ91-5-25-000. On August 7, 1991 the FERC issued a letter order which rejected MRT's September 1, 1991 quarterly PGA because it did not contain Schedule D1 on electronic medium. On August 14, 1991, MRT resubmitted its quarterly PGA to be effective September 1, 1991 to correct the omission of Schedule D1 on Electronic medium. The August 14, 1991 filing was noticed by the Commission on August 16, 1991 and designated TQ91-6-25-000.

MRT states that on August 23, 1991, it submitted a compliance filing in Docket

Nos. RP89–248 *et al.* to effectuate the terms and provisions of the Stipulation and Agreement ("S&A") approved by the Commission on August 7, 1991. The compliance filing contained revised tariff sheets which included revised base tariff rates in accordance with the S&A. Such compliance filing is currently pending Commission action.

MRT states that the purpose of the instant filing is to amend the August 14, 1991 quarterly PGA to reflect the revised base tariff rates contained in the August 23, 1991 compliance filing, and to include projected Account No. 858 expenses in the average commodity cost of gas pursuant to the Transportation Cost Recovery Mechanism set forth in Article V of the S&A.

MRT states that it is also resubmitted on September 9, 1991, under separate cover, an interim PGA originally filed on August 29, 1991 and proposed to be effective on September 1, 1991, in order to reflect the corrected pagination required on Sheet Nos. 4 and 4.1 and to incorporate conforming changes resulting from the instant filing.

MRT states that a copy of the revised tariff sheets is being mailed to each of MRT's jurisdictional sales customers and to the State Commissions of Arkansas, Missouri, and Illinois.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedure 18 CFR 385.211. All such protests should be filed on or before September 19, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestant parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 91–22552 Filed 9–18–91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. CP89–1–008]

Mojave Pipeline Co.; Petition to Amend

September 12, 1991.

Take notice that on August 30, 1991, Mojave Pipeline Company (Mojave), 1440 Smith Street, Houston, Texas, 77002, pursuant to section 7(c) of the Natural Gas Act, as amended, and the optional procedures of subpart E of part 157 of the Regulations of the Federal Energy Regulatory Commission (Commission), filed in Docket No. CP89–1–008 a petition to amend the certificate of public convenience and necessity that was issued in this docket on January 24, 1990. Mojave seeks by its amendment to adjust the initial rates for service on its previously authorized interstate pipeline system to reflect the actual costs of constructing its system, all as more fully set forth in the request on file with the Commission and open to public inspection.

Mojave states that the initial rates established by the Commission's January 24, 1990 order are based on a capital cost estimate prepared in 1989 reflecting 1989 cost levels while the proposed adjusted initial rates are based on updated costs that reflect the actual costs of constructing its system. Mojave's proposed rates also will exclude the costs of certain facilities, called the Transfer Line, that Mojave does not currently plan to construct. Further, the rates proposed by Mojave are based on a debt-equity ratio of 70/30, which will reflect its actual capitalization, as compared to the 60/40 ratio underlying its currently authorized maximum rates. Also, Mojave proposes to increase its rate of return on common equity from 13.5 percent to 14.0 percent. Mojave's proposed changes will increase its initial maximum firm transportation charge from 30.75 to 32.90 cents per MMBtu and its maximum reservation fee from 20.22 to 24.08 cents per MMBtu.

Any person desiring to be heard or to make any protest with reference to said petition to amend should on or before October 3, 1991, file with the Federal Energy Regulatory Commission, Washington, DC 20426, a motion to intervene or a protest in accordance with the requirements of the Commission's Rules of Practice and Procedure (18 CFR 385.214 or 385.211) and the Regulations under the Natural Gas Act (18 CFR 157.10). All protests filed with the Commission will be considered by it in determining the appropriate action to be taken but will not serve to make the protestants parties to the proceeding. Any person wishing to become a party to a proceeding or to participate as a party in any hearing therein must file a motion to intervene in accordance with the Commission's Rules.

Lois D. Cashell,

Secretary.

[FR Doc. 91–22540 Filed 9–18–91; 8:45 am]

BILLING CODE 6717-01-M

[Project No. 2292–001–Wisconsin]

Nekoosa Papers Inc.; Establishing Procedures for Relicensing and a Deadline for Submission of Final Amendments

September 12, 1991.

The license for the Nekoosa Project No. 2292, located on the Wisconsin River, Wood County, Wisconsin, expires on July 31, 1993. The statutory deadline for filing an application for new license was July 31, 1991. An application for new license has been filed as follows:

Project No.	Applicant	Contact
2292–001	Nekoosa Papers Inc. 100 Wisconsin River Dr. Port Edwards, WI 54469.	Mr. Richard J. Grund, Nekoosa Papers Inc., 100 Wisconsin River Dr., Port Edwards, WI 54469 (715) 887–5481.

The following is an approximate schedule and procedures that will be followed in processing the application:

Date	Action
Sept. 20, 1991	Commission notifies applicant that its application has been accepted.
Oct. 1, 1991	Commission issues public notice of the accepted application establishing dates for filing motions to intervene and protests.
Dec. 1, 1991	Commission's deadline for applicant for filing a final amendment, if any, to its application.

Upon receipt of any additional information and the information filed in response to public notices of the application, the Commission will evaluate the application in accordance with applicable statutory requirements and take appropriate action on the application.

Any questions concerning this notice should be directed to Michael Dees at 202–219–2807.

Lois D. Cashell,

Secretary.

[FR Doc. 91–22542 Filed 9–18–91; 8:45 am]

BILLING CODE 6717-01-M

[Project No. 2291-001-Wisconsin]

Nekoosa Papers Inc.; Establishing Procedures for Relicensing and a Deadline for Submission of Final Amendments

September 12, 1991.

The license for the Port Edwards Project No. 2291, located on the Wisconsin River, Wood County, Wisconsin, expires on July 31, 1993. The statutory deadline for filing an application for new license was July 31, 1991. An application for new license has been filed as follows:

Project No.	Applicant	Contact
2291-001	Nekoosa Papers Inc., 100 Wisconsin River Dr., Port Edwards, WI 54469.	Mr. Richard J. Grund, Nekoosa Papers Inc., 100 Wisconsin River Dr., Port Edwards, WI 54469, (715) 887-5481

The following is an approximate schedule and procedures that will be followed in processing the application:

Date	Action
Sept. 20, 1991	Commission notifies applicant that its application has been accepted.
Oct. 1, 1991	Commission issues public notice of the accepted application establishing dates for filing motions to intervene and protests.
Dec. 1, 1991	Commission's deadline for applicant for filing a final amendment, if any, to its application.

Upon receipt of any additional information and the information filed in response to public notices of the application, the Commission will evaluate the application in accordance with applicable statutory requirements and take appropriate action on the application.

Any questions concerning this notice should be directed to Michael Dees at 202-219-2807.

Lois D. Cashell,

Secretary.

[FR Doc. 91-22543 Filed 9-18-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket No. TM92-2-37-001]

Northwest Pipeline Corp.; Change in FERC Gas Tariff

September 12, 1991.

Take notice that on September 6, 1991 Northwest Pipeline Corporation ("Northwest") tendered the following corrected tariff sheets for filing and acceptance to be a part of its FERC Gas Tariff:

Second Revised Volume No. 1

Substitute Thirteenth Revised Sheet No. 10
Substitute Thirteenth Revised Sheet No. 11
Substitute Eighth Revised Sheet No. 13

First Revised Volume No. 1-A

Substitute Eighth Revised Sheet No. 201

Northwest states that the purpose of the filing is to revise tariff sheets filed on August 30 in the above docket number and to reflect the effects of correcting an error in sequencing Northwest's tariff sheets.

Northwest has requested an effective date of October 1, 1991 for the tendered sheets.

Northwest states that copies of the filing is being served upon Northwest's jurisdictional customers and affected state commission.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedures, 18 CFR 385.211. All such protests should be filed on or before September 19, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 91-22547 Filed 9-18-91; 8:45 am]

BILLING CODE 6717-01-M

[Docket Nos. TQ92-1-37-001, TM92-1-37-001]

Northwest Pipeline Corp.; Change in FERC Gas Tariff

September 12, 1991.

Take notice that on September 6, 1991 Northwest Pipeline Corporation ("Northwest") tendered the following corrected tariff sheets for filing and acceptance to be a part of its FERC Gas Tariff:

Second Revised Volume No. 1

First Revised Twelfth Revised Sheet No. 10
First Revised Twelfth Revised Sheet No. 11
First Revised Seventh Revised Sheet No. 13

First Revised Volume No. 1-A

First Revised Seventh Revised Sheet No. 201

Original Volume No. 2

First Revised Twenty-Third Revised Sheet No. 2-B

Northwest states that the purpose of the filing is to revise tariff sheets filed on August 30 in the above docket numbers, to correctly sequence Northwest's tariff sheets, and to incorporate the effects of the new base tariff rates recently approved in Docket No. RP91-166 *et al.*

Northwest has requested an effective date of October 1, 1991 for the tendered sheets.

Northwest states that copies of the filing is being served upon Northwest's jurisdictional customers and affected state commission.

Any person desiring to protest said filing should file a protest with the Federal Energy Regulatory Commission, 825 North Capitol Street, NE., Washington, DC 20426, in accordance with Rule 211 of the Commission's Rules of Practice and Procedures, 18 CFR 385.211. All such protests should be filed on or before September 19, 1991. Protests will be considered by the Commission in determining the appropriate action to be taken, but will not serve to make protestants parties to the proceeding. Copies of this filing are on file with the Commission and are available for public inspection.

Lois D. Cashell,

Secretary.

[FR Doc. 91-22550 Filed 9-18-91; 8:45 am]

BILLING CODE 6717-01-M

ENVIRONMENTAL PROTECTION AGENCY

[FRL-4010-6]

Agency Information Collection Activities Under OMB Review

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: In compliance with the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*), this notice announces OMB responses to Agency PRA clearance requests.

SUPPLEMENTARY INFORMATION:

OMB Responses to Agency PRA Clearance Requests

EPA ICR # 1579.02; Wood Preserving Rule, Information Collection Request

Revision; was approved 06/06/91; OMB # 2050–0115; expires 05/31/92.

EPA ICR # 0155.04; Certification of Pesticide Applicators (40 CFR Part 171); was approved 06/25/91; OMB # 2070–0029; expires 06/30/94.

EPA ICR # 0309.04; Registration of Fuels and Fuel Additives; was approved 07/02/91; OMB # 2060–0150; expires 06/30/94.

EPA ICR # 1460.03; Survey of Pharmaceutical Industry (Detailed Questionnaire); was approved 07/15/91; OMB # 2040–0146; expires 01/31/93.

EPA ICR # 0976.05; 1991 Hazardous Waste Report; was approved 08/13/91; OMB # 2050–0024; expires 09/30/92.

EPA ICR # 0111.06; National Emission Standard for Asbestos; was approved 08/14/91; OMB # 2060–0101; expires 08/31/93.

EPA ICR # 0270.26; Public Drinking Water System Program Information; was approved 08/05/91; OMB # 2040–0090; expires 12/31/93.

Partial Approval

EPA ICR # 1176.03; New Source Performance Standards for New Residential Wood Heaters (Subpart AAA); on 08/07/91 was approved, except for the requirements for quality assurance emission testing and the associated recordkeeping; OMB # 2060–0161; expires 08/31/94.

Extension of Expiration Date

EPA ICR # 1391; State Revolving Fund Programs; expiration date extended to 12/31/91/.

Dated: September 13, 1991.

Paul Lapsley,

Director, Regulatory Management Division.

[FR Doc. 91–22626 Filed 9–18–91; 8:45 am]

BILLING CODE 6560–50–M

[FRL–4010–3]

Ambient Air Monitoring Reference and Equivalent Methods; Reference Method Designation

Notice is hereby given that EPA, in accordance with 40 CFR part 53, has designated another reference method for the measurement of ambient concentrations of nitrogen dioxide. The new reference method is an automated method (analyzer) which utilizes the measurement principle (gas phase chemiluminescence) and calibration procedure specified in appendix F of 40 CFR part 50. The new designated method is identified as follows:

RFNA–0991–083, "Monitor Labs Model 8841 Nitrogen Oxides Analyzer," operated on the 0–0.05* ppm, 0–0.1* ppm, 0–0.2* ppm, 0–0.5 ppm, or 0–1.0 ppm range, with manufacturer-supplied vacuum pump or alternative user-supplied vacuum pump capable of providing 200 torr or better absolute vacuum while operating with the analyzer.

*Note: Users should be aware that designation of this analyzer for operation on ranges less than 0.5 ppm is based on meeting the same absolute performance specifications required for the 0–0.5 ppm range. Thus, designation of these lower ranges does not imply commensurably better performance than that obtained on the 0–0.5 ppm range.

This method is available from Lear Siegler Measurements Controls Corporation, 74 Inverness Drive East, Englewood, CO 80112–5189. A notice of receipt of application for this method appeared in the **Federal Register**, March 5, 1991, at (56 FR 9216).

A test analyzer representative of this method has been tested by the applicant, in accordance with the test procedures specified in 40 CFR part 53. After reviewing the results of these tests and other information submitted by the applicant, EPA has determined, in accordance with part 53, that this method should be designated as a reference method. The information submitted by the applicant will be kept on file at EPA's Atmospheric Research and Exposure Assessment Laboratory, Research Triangle Park, North Carolina 27711, and will be available for inspection to the extent consistent with 40 CFR part 2 (EPA's regulations implementing the Freedom of Information Act).

As a designated reference method, this method is acceptable for use by states and other air monitoring agencies under requirements of 40 CFR part 58, Ambient Air Quality Surveillance. For such purposes, the method must be used in strict accordance with the operation or instruction manual associated with the method and subject to any limitations (e.g., vacuum pump) specified in the applicable designation (see description of the method above). Vendor modifications of a designated method used for purposes of part 58 are permitted only with prior approval of EPA, as provided in part 53. Provisions concerning modification of such methods by users are specified under § 2.8 of appendix C to 40 CFR part 58 (Modifications of Methods by Users).

In general, this designation applies to any analyzer which is identical to the analyzer described in the designation. In some cases, similar analyzers manufactured prior to the designation may require upgrading (e.g., by minor modification or by substitution of a new operation or instruction manual) so as to be identical to the designated method and thus achieve designation status at a modest cost. The manufacturer should be consulted to determine the feasibility of such upgrading.

Part 53 requires that sellers of designated methods comply with certain conditions. These conditions are given in 40 CFR 53.9 and are summarized below:

(1) A copy of the approved operation or instruction manual must accompany the analyzer when it is delivered to the ultimate purchaser.

(2) The analyzer must not generate any unreasonable hazard to operators or to the environment.

(3) The analyzer must function within the limits of the performance specifications given in Table B–1 of part 53 for at least one year after delivery when maintained and operated in accordance with the operation manual.

(4) Any analyzer offered for sale as a reference or equivalent method must bear a label or sticker indicating that it has been designated as a reference or equivalent method in accordance with part 53.

(5) If such an analyzer has two or more selectable ranges, the label or sticker must be placed in close proximity to the range selector and indicate which range or ranges have been included in the reference or equivalent method designation.

(6) An applicant who offers analyzers for sale as reference or equivalent methods is required to maintain a list of ultimate purchasers of such analyzers and to notify them within 30 days if a reference or equivalent method designation applicable to the analyzer has been canceled or if adjustment of the analyzers is necessary under 40 CFR part 53.11(b) to avoid a cancellation.

(7) An applicant who modifies an analyzer previously designated as a reference or equivalent method is not permitted to sell the analyzer (as modified) as a reference or equivalent method (although he may choose to sell it without such representation), nor to attach a label or sticker to the analyzer (as modified) under the provisions described above, until he has received notice under 40 CFR part 53.14(c) that the original designation or a new designation applies to the method as modified or until he has applied for and received notice under 40 CFR 53.8(b) of a new reference or equivalent method determination for the analyzer as modified.

Aside from occasional breakdowns or malfunctions, consistent or repeated noncompliance with any of these

conditions should be reported to: Director, Atmospheric Research and Exposure Assessment Laboratory, Department E (MD–77), U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711.

Designation of this reference method will provide assistance to the States in establishing and operating their air quality surveillance systems under part 58. Technical questions concerning the method should be directed to the manufacturer. Additional information concerning this action may be obtained from Frank F. McElroy, Methods Research & Development Division (MD–77), Atmospheric Research and Exposure Assessment Laboratory, U.S. Environmental Protection Agency, Research Triangle Park, North Carolina 27711, (919) 541–2622.

Erich W. Bretthauer,

Assistant Administrator for Research and Development.

[FR Doc. 91–22627 Filed 9–18–91; 8:45 am]

BILLING CODE 6560-50-M

[FRL–4010–7]

Underground Injection Control Program; Request for Comments on Approval of Oxygen Activation Method Mechanical Integrity Test for Injection Well Classes I–V

AGENCY: Environmental Protection Agency.

ACTION: Notice of Alternative Method; request for comments.

SUMMARY: On February 1, 1991 (56 FR 4063), EPA published a notice of alternative method, granting final approval for the use of the Oxygen Activation (OA) tool to test fluid movement into underground sources of drinking water (USDWs) through channels adjacent to the injection well bore as an alternative to those tests specified in the Code of Federal Regulations under 40 CFR 146.8(b). The Agency intended that this approval would apply to all Classes of injection wells, effective on March 4, 1991. This test is designated the Oxygen Activation Method.

EPA is today giving notice that it is proposing to reissue approval for this test. The purpose for the notice is to solicit additional public comments on use of this test as a result of concerns raised by the American Petroleum Institute (API) regarding the technical basis for EPA's approval. An updated docket of information supporting this test and the Agency's decision rationale is available for public inspection.

DATES: Written comments and any referenced data must be submitted on or before October 21, 1991, to EPA for consideration in its decision-making process on whether to grant final approval. If no significant comments are received which warrant changes to this notice, EPA's approval will become final on October 21, 1991. EPA will publish a further notice on or before that date.

ADDRESSES: Comments should be addressed to Jeffrey B. Smith, Underground Injection Control Branch (WH–550G), Office of Ground Water and Drinking Water, U.S. EPA, 401 M Street, SW., Washington, DC 20460. A copy of the docket for the approval of this test procedure will be available for review during normal business hours at the U.S. EPA, room 1141, East Tower, 401 M Street, SW., Washington, DC 20460.

FOR FURTHER INFORMATION CONTACT: Jeffrey B. Smith; Office of Ground Water and Drinking Water (WH–550G), U.S. EPA, Washington, DC 20460, (202) 260–5586.

SUPPLEMENTARY INFORMATION:

I. Background

The Safe Drinking Water Act (SDWA) (42 U.S.C. 300h, *et seq.*) is intended to protect underground sources of drinking water (USDWs) from contamination by underground injection. One of the cornerstones of the Underground Injection Control (UIC) program is verification of the mechanical integrity of wells. Mechanical Integrity (MI) is defined as the absence of significant leaks in the casing, tubing or packer, and the absence of significant fluid movement into an underground source of drinking water through vertical channels adjacent to the injection well bore. This movement can occur from either the injection zone or from other zones or aquifers. Acceptable methods of evaluating mechanical integrity are specified in 40 CFR 146.8 for State programs administered by EPA (Direct Implementation programs), and in the program applications of the States with primary enforcement responsibility (Primacy programs) for injection wells. Section 146.8(d) states that the Director of the UIC program in a State may allow alternative mechanical integrity tests if approved by the Administrator of the EPA.

The Oxygen Activation Method, using a down hole wireline well logging instrument, employs a measurement technique in which the stable isotope of oxygen is temporarily converted to an unstable isotope of nitrogen with a very short half-life (7.13 seconds). In effect, the unstable nitrogen isotope acts as a tracer to enable a multiple detector system on the instrument to measure any flow of water-bearing fluid past the logging instrument.

Interim approval of the OA method was granted for two years beginning on October 26, 1988 (see 53 FR 37294 for a detailed discussion of interim approval for the OA method). During the interim approval period, EPA obtained more data on tool performance under actual bore hole conditions and measured the accuracy of collected data from numerous commercially-run tests and thirteen independent, carefully monitored tests at the EPA Mechanical Integrity Testing and Training Facility at the Robert S. Kerr Environmental Research Laboratory (RSKERL) in Ada, OK. The two geophysical service companies offering OA logging services logged 132 commercial oil & gas wells during the two-year interim approval period. EPA research personnel at the RSKERL reviewed field data on several dozen of these commercial wells and held extensive meetings with the service company tool development engineers relative to the performance of the tool. Copies of logging runs from 20 of the wells examined by the EPA are available for public examination.

EPA believes that widespread use of this tool, coupled with the controlled, fluid flow experiments conducted at EPA's Mechanical Integrity Testing and Training Facility, verify that OA logging is an accurate, empirical diagnostic technique. Reference data on the OA tool is available in the Administrative Record for the EPA-sponsored field tests and documentation supplied by the geophysical logging companies offering the service.

The American Petroleum Institute has filed a petition for review of EPA's February 1, 1991 approval of this method in the U.S. Court of Appeals for the D.C. Circuit (No. 91–1119). API has expressed the belief that the Administrative Record is not sufficiently well documented to support that decision and that EPA failed to consider fully API's comments. While EPA believes that its February 1, 1991 notice addressed API's concerns, it is taking this opportunity to explain in more detail its responses and to provide an additional opportunity for public comment on API's and any other issues that interested parties may wish to raise on use of the OA test. API's comments, filed in April, 1990, argued that the logging technique should not be granted final approval because (1) the accuracy of the test has not been properly verified by widespread use among industry operators and that most of the logs

which have been run commercially have involved only "special applications" of the log (API does not identify or discuss this term) due to industry unfamiliarity with the tool, (2) independent research by API member companies (Shell and Texaco) have demonstrated (in the opinion of API) that the OA log is affected adversely by lithology and that flow detection is dependent upon specific flow situations within the well bore (i.e., measurements may be adversely affected when the well is logged through tubing rather than in an open casing) and (3) two older and less expensive logging techniques (temperature and noise logging) have been granted final approval as alternative MIT techniques and (in the judgment of the API) have flow rate resolutions comparable, under controlled test pit conditions, to that of the OA log. EPA responds to each of these issues in turn.

EPA disagrees that the OA log has not yet been adequately validated or confirmed by sufficient testing. The results from the 13 tests of commercial OA tools conducted under the controlled test environment at the Mechanical Integrity Testing and Training Facility are sufficient by themselves to verify tool performance. The repeatability of the measurements and correlation of flow against known (controlled) flow rates/volumes at the facility are empirical experimental data that is unobtainable from tests in operating wells, where quantitative baseline information (relative to flow rates behind the casing) cannot be independently measured by any other technique. Thus, these 13 tests provide the most scientifically reliable information available regarding the validity of the OA method. EPA believes the logs from these 13 tests demonstrate the accuracy of the OA method. Copies of the logs and a description of the experimental procedures and results from these test runs are available in the Administrative Record.

EPA also disagrees that the OA log has not been widely used or adequately verified by field applications. Corroborative test results from the experiments conducted at the EPA test facility by the two commercial logging service companies which conduct OA logging are cited in the company service manuals and technical papers available in the docket. The fact that the tool has been available as a commercial logging service for approximately 4 years and that a total of 247 wells were logged between September, 1987 and May 15, 1991 demonstrates acceptability by the industry as a whole. A list of all of the commercial wells, the location of those wells, the date of the logging runs and company performing the logging services is also available in the Administrative Record. A large number (approximately 50%) of the commercially logged wells are operated by member companies of API.

EPA also disagrees with API's technical objections to the accuracy of the OA log. To date, no physical data (actual log runs or independent experimental data) has been submitted by API or any other party that refutes the performance of the OA tool as demonstrated by the above cited lab and field tests. The original comments submitted by API (April 26, 1990) challenging the accuracy of the OA log consisted of references to three technical papers presented at the International Symposium on Class I & II Injection Well Technology (May, 1989) sponsored by the Underground Injection Practices Council Research Foundation. The three papers (The Oxygen Activation Log—A Laboratory Evaluation by Paap, Nussbaum, and Supernaw, Texaco USA; Practical Experience with Oxygen Activation Logging in South Mississippi by J.B. Wieseneck, Shell Offshore, Inc. and Temperature and Noise Logging for Non-Injection Related Fluid Movement by R. M. McKinley, Exxon Production Research Co.) presented arguments that (1) casing configurations and specific flow situations can affect the flow detection limits of the tool, (2) lithology may also alter OA measurements and (3) temperature & noise logging are as accurate as OA logs for MIT purposes. While EPA recognizes that these individuals were well qualified to offer opinions on the accuracy of the OA log, EPA concluded that the limited laboratory experiments and field test data on which they relied are not conclusive evidence of the inability of the OA tool to resolve flow measurements when run through tubing. Based upon considerable discussions with logging service personnel, review of submitted logging data, and observation of tool performance at both service company research facilities and the EPA well test facility, the logging service companies have adequately demonstrated that annular flow (in the casing-tubing annulus) and lithology do not affect the log. EPA researchers agree with these conclusions.

EPA believes that the cost of using the OA logging technique is irrelevant to the question of whether the OA method should be approved as an alternative MIT. The regulations (40 CFR 146.8 (d) state that a test shall be approved ". . . if it will reliably demonstrate the mechanical integrity of wells for which its use is proposed." The OA method is available as an additional, acceptable method of demonstrating mechanical integrity. The operator may negotiate with the State UIC Director for the most cost-effective method of demonstrating mechanical integrity. API argues that now that the OA log is approved, the State UIC Director may always require that an operator run the more expensive OA long to demonstrate mechanical integrity. The UIC Director has always had the authority to require any log or suite of logs that he/she believes may be necessary to demonstrate non-endangerment of USDWs (40 CFR 144.27 (a)). Providing this information, which could include results of an OA log, did not relieve the operator from his duty to perform an approved MIT. Approval of the OA log as an alternative MIT does not alter the Director's authority to require information; it simply allows him to accept results of an OA log as proof of mechanical integrity. Thus, the cost to the operator has no bearing on EPA's approval.

Dr. R.M. McKinley, who is often cited by API for his research on the applicability of existing MIT methodologies, states in his paper that "* * * two older and less expensive (than the OA log) logging procedures—temperature and noise surveys—are equally applicable to the detection of non-injection related crossflow". Dr. McKinley also stated in his conclusions that: "Example logs have established that the widely available and relatively inexpensive temperature and noise surveys are suitable for the detection of unrelated water flow behind the pipe. The resolution of these surveys are comparable to that of the oxygen activation tool." EPA has no argument with Dr. McKinley's statements and has never proposed that the OA log either replace or be required as the only alternative for demonstrating the absence of fluid movement behind the casing string. As previously stated, EPA merely contends that this is proven technology that may be used as one of several approved alternative techniques for demonstrating the mechanical integrity of an injection well.

In summary, the Oxygen Activation Method is intended as an addition to the current inventory of approved alternative mechanical integrity tests, providing UIC Program Directors another, reliable, test alternative for ascertaining that fluid movement into USDWs through channels adjacent to the well bore is not occurring and that USDWs will not be endangered. The

UIC Director for both Primacy and Direct Implementation programs already had the authority to require that this or any other log be run if he/she deemed it necessary in evaluating underground injection operations to assure non-endangerment to USDWs (40 CFR 144.27). The intent and responsibility inherent in this established authority are independent of the approval of this alternative MIT methodology. Therefore, EPA continues to believe that the OA log should be approved as an alternative MIT. EPA solicits any comments or data that may affect the conclusions stated here.

II. Special Conditions

A. Limitations for Conducting the Oxygen Activation Method Mechanical Integrity Test

As previously mentioned, extensive testing and evaluation of this logging technique has been conducted by the EPA. Based upon this analysis, the following are prescribed limitations for conducting the Oxygen Activation Method mechanical integrity test:

(1) The Oxygen Activation Method has only been perfected by a limited number of commercial geophysical logging companies. Only those companies providing logging tools capable of detecting flow velocities of at least three (3) feet per minute shall be employed in demonstrating mechanical integrity pursuant to 40 CFR 146.8(a)(2). Individual UIC Directors can supply interested parties with a list of companies that provide acceptable OA logging services.

(2) Determination of injection zone isolation and/or fluid flow behind the pipe (i.e., flow that is not directly related to injection) will require that readings be taken at a minimum of three stations. Three readings lasting at least 5 minutes shall be taken at each stationary position. This procedure allows enough information to be gathered so that more precise results will be obtained. In some cases where results are inconclusive, additional readings over longer time periods may be required by the UIC Director. If the repeat measurements are identical or within the normal range of statistical error for the tool then the measurement shall be accepted as accurate and valid.

(3) Demonstration of injection zone isolation also will require that the three stations be located far enough above the top of the injection zone (at least 10 feet) that turbulence does not affect the readings. All readings should be taken with the well injecting fluid at the normal rate. The injection should be continuous with minimum rate and pressure fluctuations.

(4) Determination of flow behind the pipe will require that the stations be located at the base of each USDW, adjacent to the confining layer which isolates injection fluid from the injection zone, and at some point between the two locations.

(5) If any significant flow indication (e.g., >3 ft./minute) is observed, the well shall fail the test (i.e., it does not establish mechanical integrity pursuant to requirements stated in 40 CFR 146.8(a)(2)).

(6) The Oxygen Activation Method shall not be used in wells with pipe diameters less than 1 11/16 inches (inside diameter).

(7) The Oxygen Activation Method shall be used only for pipe diameters up to 13⅜ inches (inside diameter).

B. Determination

The Oxygen Activation Method, subject to the conditions and procedures discussed in this notice, provides the necessary information to demonstrate reliably whether a well has significant fluid movement through vertical channels adjacent to the well bore.

Subject to receipt and consideration of comments and referenced data, EPA is proposing to reapprove this test as an effective alternative mechanical integrity test for well Classes I through V in all States.

Dated: September 10, 1991.

James R. Elder,

Director, Office of Ground Water and Drinking Water.

[FR Doc. 91-22625 Filed 9-18-91; 8:45 am]

BILLING CODE 6560-50-M

[FRL-4010-5]

Underground Injection Control Program; Hazardous Waste Disposal Injection Restrictions; Petition for Exemption—Class I Hazardous Waste Injection; E.I. du Pont de Nemours

AGENCY: Environmental Protection Agency.

ACTION: Notice of final decision on petition.

SUMMARY: Notice is hereby given that an exemption to the land disposal restrictions under the 1984 Hazardous and Solid Waste Amendments to the Resource Conservation and Recovery Act has been granted to E.I. du Pont de Nemours, for the Class I injection wells located at Orange, Texas. As required by 40 CFR part 148, the company has adequately demonstrated to the satisfaction of the Environmental Protection Agency by petition and supporting documentation that, to a reasonable degree of certainty, there will be no migration of hazardous constituents from the injection zone for as long as the waste remains hazardous. This final decision allows the underground injection by E.I. du Pont de Nemours, of the specific restricted hazardous waste identified in the petition, into the Class I hazardous waste injection wells at the Orange, Texas facility specifically identified in the petition, for as long as the basis for granting an approval of the petition remains valid, under provisions of 40 CFR 148.24. As required by 40 CFR 124.10, a public notice was issued July 5, 1991. A public hearing was held August 7, 1991, and a public comment period ended on August 19, 1991. All comments have been addressed and have been considered in the final decision. This decision constitutes final Agency action and there is no Administrative appeal.

DATES: This action is effective as of September 10, 1991.

ADDRESSES: Copies of the petition and all pertinent information relating thereto are on file at the following location: Environmental Protection Agency, Region 6, Water Management Division, Water Supply Branch (6W-SU), 1445 Ross Avenue, Dallas, Texas 75202-2733.

FOR FURTHER INFORMATION CONTACT: Oscar Cabra, Jr., Chief Water Supply Branch, EPA—Region 6, telephone (214) 655-7110, (FTS) 255-7110.

Myron O. Knudson,

Director, Water Management Division (6W).

[FR Doc. 91-22628 Filed 9-18-91; 8:45 am]

BILLING CODE 6560-50-M

[OPP-00309; FRL-3948-4]

State FIFRA Issues Research and Evaluation Group (SFIREG); Working Committee on Groundwater Protection and Pesticide Disposal; Open Meeting

AGENCY: Environmental Protection Agency (EPA).

ACTION: Notice.

SUMMARY: The State FIFRA Issues Research and Evaluation Group (SFIREG) Working Committee on Groundwater Protection and Pesticide Disposal will hold a 2-day meeting, beginning on September 26, 1991, and ending on September 27, 1991. This notice announces the location and times for the meeting and sets forth tentative agenda topics. The meeting is open to the public.

DATES: The SFIREG Working Committee will meet on Thursday, September 26, 1991, from 8:30 a.m. to 5 p.m., and on Friday, September 27, 1991, beginning at 8:30 a.m. and adjourning at approximately 1 p.m.

ADDRESSES: The meeting will be held at: Days Hotel - Crystal City, 2000 Jefferson Davis Highway, Arlington, VA, (703) 920–8600.

FOR FURTHER INFORMATION CONTACT: By mail: Arty Williams, Office of Pesticide Programs (H7506C), Environmental Protection Agency, 401 M St., SW., Washington, DC 20460. Office location and telephone number: Rm. 1100E, Crystal Mall No. 2, 1921 Jefferson Davis Highway, Arlington, VA, (703) 557–7371.

SUPPLEMENTARY INFORMATION: The tentative agenda includes the following:

1. Final Ground Water Task Force Report and its impact on FY '93 cooperative agreement guidance.
2. Pesticides and Ground Water Strategy status report.
3. State Management Plan guidance and support documents discussion.
4. Status report on the Phase 2 Report of the National Pesticides in Drinking Water Survey.
4. Proposed Ground Water Restricted Use Rule.
5. Report of the Senior Pesticide Officials' Ground Water Course.
6. Discussion of the draft report from the SFIREG pesticide mixing/loading site survey.
7. Wetlands definition discussion.
8. FIFRA section 19 disposal regulations.
9. State pesticide disposal projects and discussion of problems, solutions and RCRA implications.
10. Definitions and issues related to pesticide vs. waste in the wood preservative area.
11. University of Illinois and Ciba Geigy's report on a developmental mobile pesticide container incinerator.
12. State reports on initiatives related to ground water protection and pesticide disposal.
13. Other topics as appropriate.

Dated: September 12, 1991.

Douglas D. Campt,

Director, Office of Pesticide Programs.

[FR Doc. 91–22572 Filed 9–18–91; 8:45 am]

BILLING CODE 6560-50-F

FEDERAL MARITIME COMMISSION

Port of Oakland/Mitsui O.S.K. Lines Terminal Agreement; Agreement(s) Filed

The Federal Maritime Commission hereby gives notice of the filing of the following agreement(s) pursuant to section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., room 10325. Interested parties may submit comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments are found in § 572.603 of title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Agreement No.: Agreement No. 224–20563.

Title: Port of Oakland/Mitsui O.S.K. Lines Terminal Agreement.

Parties: City of Oakland ("Port") Mitsui O.S.K. Lines, Ltd. ("Mitsui").

Synopsis: The proposed Agreement filed September 6, 1991, would permit Mitsui to lease certain assigned premises in the Port's Seventh Street Marine Terminal area on a nonexclusive preferential basis for use as a containership terminal. The Agreement has an initial term of twenty-five years.

By Order of the Federal Maritime Commission.

Dated: September 13, 1991.

Joseph C. Polking,

Secretary.

[FR Doc. 91–22537 Filed 9–18–91; 8:45 am]

BILLING CODE 6730-01-M

South Louisiana Port Commission/ Occidental Chemical Corporation Terminal Lease Agreement; Agreement(s) Filed

The Federal Maritime Commission hereby gives notice that the following agreement(s) has been filed with the Commission pursuant to section 15 of the Shipping Act, 1916, and section 5 of the Shipping Act of 1984.

Interested parties may inspect and obtain a copy of each agreement at the Washington, DC Office of the Federal Maritime Commission, 1100 L Street, NW., room 10325. Interested parties may submit protests or comments on each agreement to the Secretary, Federal Maritime Commission, Washington, DC 20573, within 10 days after the date of the **Federal Register** in which this notice appears. The requirements for comments and protests are found in § 560.7 and/or § 572.603 of title 46 of the Code of Federal Regulations. Interested persons should consult this section before communicating with the Commission regarding a pending agreement.

Any person filing a comment or protest with the Commission shall, at the same time, deliver a copy of that document to the person filing the agreement at the address shown below.

Agreement No.: 224–003969–003.

Title: South Louisiana Port Commission/Occidental Chemical Corporation Terminal Lease Agreement.

Parties: South Louisiana Port Commission (Port Commission) Occidental Chemical Corporation (Petroleum).

Filing Party: Milton J. Stickles, Jr., Esq. Cadwalader, Wickersham & Taft 1333 New Hampshire Avenue, NW., Washington, DC 20036

Synopsis: Agreement No. 224–003969–003, designated as "The Amended Lease", revises and restates a lease agreement and amendments nos. 1 and 2 thereto that were filed with the Federal Maritime Commission as Agreements No. T–3969, T–3969–1 and T–3969–2 and approved by Commission Order dated June 25, 1981. The Amended Lease covers terminal facilities located in St. Charles Parish, Louisiana. The facilities will be used by Lessee and other common and contract carriers in interstate and foreign commerce in the loading and unloading of vessels and storage of ammonia and other compatible products. Lessee and Lessor are amending the original 1981 agreement in order to provide for the lease of the facilities to Lessee (which is the successor to the original lessee, Hooker Chemical Properties Corporation) and payment by the Lessee of rental payments in an amount sufficient to timely pay the principal of premium, if any, and interest on revenue bonds and other amounts due.

Agreement No. 224–003969–003 is filed under both section 15 of the Shipping Act, 1916 and section 5 of the Shipping Act of 1984.

Agreement No.: 224–003969–004.

Title: South Louisiana Port Commission and Occidental Petroleum Corporation (Petroleum) Lease Guaranty Agreement.

Parties: South Louisiana Port Commission (Port Commission) Occidental Petroleum Corporation (Petroleum).

Filing Party: Milton J. Stickles, Jr., Esq. Cadwalader, Wickerson & Taft 1333 New Hampshire Avenue, NW., Washington, DC 20036

Synopsis: Agreement No. 224–003969–004, designated as a Lease Guaranty Agreement (Guaranty Agreement) obligates Petroleum to perform the agreements and obligations of

Occidental Chemical Corporation (Chemical) under the Amended and Restated Lease Agreement (Amended Lease) between Port Commission and Chemical (Agreement No 224-003969-003) in the event of Chemical's default or non performance of the Amended Lease

Agreement No 224-003969-004 is filed under both section 15 of the Shipping Act, 1916 and section 5 of the Shipping Act of 1984

By Order of the Federal Maritime Commission

Dated: September 12, 1991

Joseph C. Polking,

Secretary

[FR Doc. 91-22538 Filed 9-18-91, 8:45 am]

BILLING CODE 6730-01-M

GOVERNMENT PRINTING OFFICE

Depository Library Council to the Public Printer; Meeting

The Depository Library Council to the Public Printer will meet October 22-23, 1991, at the U.S. Government Printing Office (GPO), in the Carl Hayden Room, 732 North Capitol Street NW., Washington, DC 20401.

The purpose of this meeting is to discuss the Depository Library Program.

The meeting is open to the public. Anyone who wishes to attend should notify John Tate, U.S. Government Printing Office (SL), Washington, DC 20401. Telephone: (202) 275-1109. A limited number of hotel rooms have been reserved at the Quality Inn Hotel on Capitol Hill, 415 New Jersey Avenue NW., Washington, DC 20001, for anyone needing hotel accommodations. Telephone: (202) 638-1616. Room cost per night is $85.00.

Dated: September 10, 1991.

Robert W. Houk,

Public Printer.

[FR Doc. 91-22524 Filed 9-18-91; 8:45 am]

BILLING CODE 1505-01-M

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Food and Drug Administration

[Docket No. 91F-0339]

Betz Laboratories, Inc.; Filing of Food Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Betz Laboratories, Inc., has filed a petition proposing that the food additive regulations be amended to provide for the safe use of 2 bromo 2 nitro 1,3 propanediol as an antimicrobial/preservative in fillers, binders, pigment slurries, sizings, and coatings used in the manufacture of paper and paperboard articles intended for food contact use

FOR FURTHER INFORMATION CONTACT: Richard H. White, Center for Food Safety and Applied Nutrition (HFF-335), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202-472-5690.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (sec. 409(b)(5) (21 U.S.C. 348(b)(5))), notice is given that a petition (FAP 1B4279) has been filed by Betz Laboratories, Inc, 4636 Somerton Rd., Trevose, PA 19053. The petition proposes to amend the food additive regulations in § 176.170 *Components of paper and paperboard in contact with aqueous and fatty foods* (21 CFR 176.170) to provide for the safe use of 2-bromo-2-nitro-1,3-propanediol as an antimicrobial/preservative in fillers, binders, pigment slurries, sizings, and coatings used in the manufacture of paper and paperboard articles intended for food-contact use.

The potential environmental impact of this action is being reviewed. If the agency finds that an environmental impact statement is not required and this petition results in a regulation, the notice of availability of the agency's finding of no significant impact and the evidence supporting that finding will be published with the regulation in the **Federal Register** in accordance with 21 CFR 25.40(c).

Dated: September 9, 1991.

Fred R. Shank,

Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 91-22640 Filed 9-18-91; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 91F-0287]

Henkel Corp.; Filing of Food Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Henkel Corp. has filed a petition proposing that the food additive regulations be amended to change the melting point range from "49°C to 52°C" to "55°C to 58°C" and to revise the identity description for the additive pentaerythritol adipate stearate to indicate that it is an ester of pentaerythritol with adipic acid and stearic acid plus its associated acids (chiefly palmitic) having 14 percent adipic acid and 71 percent stearic acid and its associated acids

FOR FURTHER INFORMATION CONTACT: Julius Smith, Center for Food Safety and Applied Nutrition (HFF-335), Food and Drug Administration, 200 C St SW., Washington, DC 20204, 202-472-5690.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (sec. 409(b)(5) (21 U.S.C. 348(b)(5))), notice is given that a petition (FAP 1B4270), has been filed by Henkel Corp., 300 Brookside Ave., Ambler, PA 19002. The petition proposes to amend the food additive regulations in § 178.3690 *Pentaerythritol adipate-stearate* (21 CFR 178.3690) to change the melting point range from "49°C to 52°C" to "55°C to 58°C" and to revise the identity description for the additive pentaerythritol adipate-stearate to indicate that it is an ester of pentaerythritol with adipic acid and stearic acid plus its associated acids (chiefly palmitic) having 14 percent adipic acid and 71 percent stearic acids and its associated acids.

The potential environmental impact of this action is being reviewed. If the agency finds that an environmental impact statement is not required and this petition results in a regulation, the notice of availability of the agency's finding of no significant impact and the evidence supporting that finding will be published with the regulation in the **Federal Register** in accordance with 21 CFR 25.40(c).

Dated: September 9, 1991.

Fred R. Shank,

Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 91-22641 Filed 9-18-91; 8:45 am]

BILLING CODE 4160-01-M

[Docket No. 91F-0328]

Yoshitomi Pharmaceutical Industries, LTD.; Filing of Food Additive Petition

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: The Food and Drug Administration (FDA) is announcing that Yoshitomi Pharmaceutical Industries, Ltd., has filed a petition proposing that the food additive regulations be amended to provide for the safe use of 4,5-dicloro-1,2-dithiol-3-

one as a slimicide in the manufacture of paper and paperboard articles intended to contact food.

FOR FURTHER INFORMATION CONTACT: Richard H. White, Center for Food Safety and Applied Nutrition (HFF–335), Food and Drug Administration, 200 C St. SW., Washington, DC 20204, 202–472–5690.

SUPPLEMENTARY INFORMATION: Under the Federal Food, Drug, and Cosmetic Act (sec. 409(b)(5) (21 U.S.C. 348(b)(5))), notice is given that a petition (FAP 1B4275) has been filed by Yoshitomi Pharmaceutical Industries, Ltd., c/o suite 1000, 1625 K St. NW., Washington, DC 20006–1604. The petition proposes to amend the food additive regulations in § 176.300 *Slimicides* (21 CFR 176.300) to provide for the safe use of 4,5-dicloro-1,2-dithiol-3-one as a slimicide in the manufacture of paper and paperboard articles intended to contact food.

The potential environmental impact of this action is being reviewed. If the agency finds that an environmental impact statement is not required and this petition results in a regulation, the notice of availability of the agency's finding of no significant impact and the evidence supporting that finding will be published with the regulation in the **Federal Register** in accordance with 21 CFR 25.40(c).

Dated: September 9, 1991.

Fred R. Shank,

Director, Center for Food Safety and Applied Nutrition.

[FR Doc. 91–22642 Filed 9–18–91; 8:45 am]

BILLING CODE 4160–01–M

Advisory Committees; Meetings

AGENCY: Food and Drug Administration, HHS.

ACTION: Notice.

SUMMARY: This notice announces forthcoming meetings of public advisory committees of the Food and Drug Administration (FDA). This notice also summarizes the procedures for the meetings and methods by which interested persons may participate in open public hearings before FDA's advisory committees.

MEETINGS: The following advisory committee meetings are announced:

Ophthalmic Devices Panel of the Medical Devices Advisory Committee

Date, time, and place. October 4, 1991, 9 a.m., First Floor Auditorium, Hubert H. Humphrey Bldg., 200 Independence Ave. SW., Washington, DC.

Type of meeting and contact person. Open public hearing, 9 a.m. to 10 a.m., unless public participation does not last that long; open committee discussion, 10 a.m. to 3 p.m.; closed committee deliberations, 3 p.m. to 4 p.m.; open committee discussion, 4 p.m. to 5 p.m.; Daniel W. C. Brown, Center for Devices and Radiological Health (HFZ–460), Food and Drug Administration, 1390 Piccard Dr., Rockville, MD 20850, 301–427–1080.

General functions of the committee. The committee reviews and evaluates data on the safety and effectiveness of marketed and investigational devices and makes recommendations for their regulation.

Agenda—Open public hearing. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the contact person before September 20, 1991, and submit a brief statement of the names and addresses of proposed participants, and an indication of the approximate time required to make their comments.

Open committee discussion. The committee will discuss general issues relating to approvals of premarket approval applications (PMA's) for contact lenses, intraocular lenses, and other class III surgical or diagnostic devices, and may discuss specific PMA's for these devices.

Closed committee deliberations. The committee may discuss trade secret and/or confidential commercial information relevant to PMA's for contact lenses, intraocular lenses, and surgical or diagnostic devices. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

Peripheral and Central Nervous System Drugs Advisory Committee

Date, time, and place. October 24 and 25, 1991, 8 a.m., Conference Rms. D and E, Parklawn Bldg., 5600 Fishers Lane, Rockville, MD.

Type of meeting and contact person. Open public hearing, October 24, 1991, 8 a.m. to 9 a.m., unless public participation does not last that long; closed committee deliberations, 9 a.m. to 5 p.m.; open public hearing, October 25, 1991, 8 a.m. to 9 a.m., unless public participation does not last that long; open committee discussion, 9 a.m. to 5 p.m.; Michael A. Bernstein, Center for Drug Evaluation and Research (HFD–120), Food and Drug Administration, 5600 Fishers Lane, Rockville, MD 20857, 301–443–4020.

General function of the committee. The committee reviews and evaluates data on the safety and effectiveness of marketed and investigational human drugs for use in neurological diseases.

Agenda—Open public hearing. Interested persons may present data, information, or views, orally or in writing, on issues pending before the committee. Those desiring to make formal presentations should notify the contact person before October 17, 1991, and submit a brief statement of the general nature of the evidence or arguments they wish to present, the names and addresses of proposed participants, and an indication of the approximate time required to make their comments.

Open committee discussion. On October 25, 1991, the committee will discuss IMIGRAN Injectable (Sumatriptan Injectable), new drug application 20–080, Glaxo, Inc., for use in the treatment of migraine.

Closed committee deliberations. On October 24, 1991, the committee will discuss trade secret and/or confidential commercial information relevant to a pending investigational new drug application. This portion of the meeting will be closed to permit discussion of this information (5 U.S.C. 552b(c)(4)).

Each public advisory committee meeting listed above may have as many as four separable portions: (1) An open public hearing, (2) an open committee discussion, (3) a closed presentation of data, and (4) a closed committee deliberation. Every advisory committee meeting shall have an open public hearing portion. Whether or not it also includes any of the other three portions will depend upon the specific meeting involved. The dates and times reserved for the separate portions of each committee meeting are listed above.

The open public hearing portion of each meeting shall be at least 1 hour long unless public participation does not last that long. It is emphasized, however, that the 1 hour time limit for an open public hearing represents a minimum rather than a maximum time for public participation, and an open public hearing may last for whatever longer period the committee chairperson determines will facilitate the committee's work.

Public hearings are subject to FDA's guideline (subpart C of 21 CFR part 10) concerning the policy and procedures for electronic media coverage of FDA's public administrative proceedings, including hearings before public advisory committees under 21 CFR part 14. Under 21 CFR 10.205, representatives of the electronic media may be permitted, subject to certain limitations, to videotape, film, or otherwise record FDA's public administrative

proceedings including presentations by participants

Meetings of advisory committees shall be conducted, insofar as is practical, in accordance with the agenda published in this **Federal Register** notice Changes in the agenda will be announced at the beginning of the open portion of a meeting

Any interested person who wishes to be assured of the right to make an oral presentation at the open public hearing portion of a meeting shall inform the contact person listed above, either orally or in writing, prior to the meeting. Any person attending the hearing who does not in advance of the meeting request an opportunity to speak will be allowed to make an oral presentation at the hearing's conclusion, if time permits, at the chairperson's discretion.

The agenda, the questions to be addressed by the committee, and a current list of committee members will be available at the meeting location on the day of the meeting.

Transcripts of the open portion of the meeting will be available from the Freedom of Information Office (HFI–35), Food and Drug Administration, rm. 12A–16, 5600 Fishers Lane, Rockville, MD 20857, approximately 15 working days after the meeting, at a cost of 10 cents per page. The transcript may be viewed at the Dockets Management Branch (HFA–305), Food and Drug Administration, rm. 1–23, 12420 Parklawn Dr., Rockville, MD 20857, approximately 15 working days after the meeting, between the hours of 9 a.m. and 4 p.m. Monday through Friday. Summary minutes of the open portion of the meeting will be available from the Freedom of Information Office (address above) beginning approximately 90 days after the meeting.

The Commissioner, with the concurrence of the Chief Counsel, has determined for the reasons stated that those portions of the advisory committee meetings so designated in this notice shall be closed. The Federal Advisory Committee Act (FACA) (5 U.S.C. app. 2, 10(d)), permits such closed advisory committee meetings in certain circumstances. Those portions of a meeting designated as closed, however, shall be closed for the shortest possible time, consistent with the intent of the cited statutes.

The FACA, as amended, provides that a portion of a meeting may be closed where the matter for discussion involves a trade secret; commercial or financial information that is privileged or confidential; information of a personal nature, disclosure of which would be a clearly unwarranted invasion of personal privacy; investigatory files compiled for law enforcement purposes information the premature disclosure of which would be likely to significantly frustrate implementation of a proposed agency action; and information in certain other instances not generally relevant to FDA matters

Examples of portions of FDA advisory committee meetings that ordinarily may be closed, where necessary and in accordance with FACA criteria, include the review, discussion, and evaluation of drafts of regulations or guidelines or similar preexisting internal agency documents, but only if their premature disclosure is likely to significantly frustrate implementation of proposed agency action; review of trade secrets and confidential commercial or financial information submitted to the agency; consideration of matters involving investigatory files compiled for law enforcement purposes; and review of matters, such as personnel records or individual patient records, where disclosure would constitute a clearly unwarranted invasion of personal privacy.

Examples of portions of FDA advisory committee meetings that ordinarily shall not be closed include the review, discussion, and evaluation of general preclinical and clinical test protocols and procedures for a class of drugs or devices; consideration of labeling requirements for a class of marketed drugs or devices; review of data and information on specific investigational or marketed drugs and devices that have previously been made public; presentation of any other data or information that is not exempt from public disclosure pursuant to the FACA, as amended; and, notably deliberative session to formulate advice and recommendations to the agency on matters that do not independently justify closing.

This notice is issued under section 10(a) (1) and (2) of the Federal Advisory Committee Act (5 U.S.C. App. 2), and FDA's regulations (21 CFR Part 14) on advisory committees.

Dated: September 13, 1991

David A. Kessler,

Commissioner of Food and Drugs.

[FR Doc. 91–22639 Filed 9–16–91; 2:25 p.m.]

BILLING CODE 4160–01–M

National Institutes of Health

National Cancer Institute; Meeting; Cancer Biology-Immunology Contracts Review Committee

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the Cancer Biology-Immunology Contracts Review Committee National Cancer Institute National Institutes of Health October 7–9 1991 Bethesda Ramada Inn, 8400 Wisconsin Avenue Bethesda Maryland 20814

This meeting will be open to the public on October 7 from 9 a.m. to 9:30 a.m to discuss administrative details Attendance by the public will be limited to space available.

In accordance with provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92–463, the meeting will be closed to the public on October 7 from 9:30 a.m. to recess for the review, discussion and evaluation of individual contract proposals. These proposals and the discussions could reveal confidential trade secrets or commercial property such as patentable material and personal information concerning individuals associated with the proposals, disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

On October 8–9, members of the Cancer Biology-Immunology Contracts Review Committee will present a workshop entitled "Current Approaches to Cancer Biology and Immunology Research." The workshop will be open to the public on October 8 from 8 a.m. to recess and on October 9 from 8:30 am. to adjournment. Attendance by the public will be limited to space available.

The Committee Management Officer, National Cancer Institute, Building 31, room 10A46, National Institutes of Health, Bethesda, Maryland 20892 (301/496–5708) will provide summaries of the meeting and rosters of committee members upon request.

Dr. Lalita D. Palekar, Executive Secretary, Cancer Biology—Immunology Contracts Review Committee, 5333 Westbard Avenue, room 805 Bethesda, Maryland 20892 (301/496–7575) will furnish substantive program information.

(Catalog of Federal Domestic Assistance Program Numbers: 93.393, Cancer Cause and Prevention Research; 93.395, Cancer Detection and Diagnosis Research; 93.395, Cancer Treatment Research; 93.396, Cancer Biology Research; 93.397, Cancer Centers Support; 93.398, Cancer Research Manpower 93.399, Cancer Control)

Dated: September 13, 1991

Samuel C. Rawlings,

Acting Committee Management Officer, NIH

[FR Doc. 91–22618 Filed 9–18–91, 8:45 am]

BILLING CODE 4140–01–M

National Center for Research Resources; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the National Advisory Research Resources Council (NARRC), on September 18–20, which was published in the **Federal Register**, August 22, (FR 91–20153).

This Council was to have convened at 11 a.m. to adjournment on September 20, in closed session for review of grant applications. The meeting now will convene in closed session from 11 a.m. to 12:15 p.m. in Conference room 10, Building 31C, National Institutes of Health. The meeting will reopen to the public from 1:15 p.m. to adjournment.

Dated: September 13, 1991.

Samuel C. Rawlings,

Acting Committee Management Officer, NIH.

[FR Doc. 91–22619 Filed 9–18–91; 8:45 am]

BILLING CODE 4140–01–M

National Institute of Diabetes and Digestive and Kidney Diseases; Meeting, National Digestive Diseases Advisory Board

Pursuant to Public Law 92–463, notice is hereby given of the meeting of the National Digestive Diseases Advisory Board on October 28, 1991. The meeting will begin at approximately 8 a.m. and adjourn at approximately 5 p.m. The meeting, which will be open to the public, will be held at the Crystal City Marriott, 1999 Jefferson Davis Highway, Arlington, Virginia 22032. The meeting will be devoted to a discussion of the Board's respective legislative priorities for the coming year. Numerous organizations in the digestive diseases and nutrition communities have been invited to provide input. Attendance by the public will be limited to space available. Notice of the meeting room will be posted in the hotel lobby.

Mr. Raymond M. Kuehne, Executive Director, National Digestive Diseases Advisory Board, 1801 Rockville Pike, suite 500, Rockville, Maryland 20852, (301) 496–6045, will provide on request an agenda and roster of the members. Summaries of the meeting may also be obtained by contacting his office.

Dated: September 13, 1991.

Samuel C. Rawlings,

Acting Committee Management Officer, NIH.

[FR Doc. 91–22616 Filed 9–18–91; 8:45 am]

BILLING CODE 4140–01–M

National Institute of Neurological Disorders and Stroke; Amended Notice of Meeting

Notice is hereby given of a change in the meeting of the Neurological Disorders Program Project Review A Committee, National Institute of Neurological Disorders and Stroke, October 16–18, 1991, Holiday Inn, 8120 Wisconsin Avenue, Bethesda, Maryland, which was published in the **Federal Register** on August 26, 1991 (56 FR 42063).

The committee meeting was to be held at the Holiday Inn, Bethesda, but has been changed to the Chevy Chase Holiday Inn, 5520 Wisconsin Avenue, Chevy Chase, Maryland.

The meeting will be open to the public on October 16 from 7:30 p.m. to 8 p.m. and will be closed from 8 p.m. to adjournment on October 18 for the review of grant applications.

Dated: September 13, 1991.

Samuel C. Rawlings,

Acting Committee Management Officer, NIH.

[FR Doc. 91–22617 Filed 9–18–91; 8:45 am]

BILLING CODE 4140–01–M

Division of Research Grants; Meetings

Pursuant to Public Law 92–463, notice is hereby given of the meetings of the following study sections for October through November 1991, and the individuals from whom summaries of meetings and rosters of committee members may be obtained.

These meetings will be open to the public to discuss administrative details relating to study section business for approximately one hour at the beginning of the first session of the first day of the meeting. Attendance by the public will be limited to space available. These meetings will be closed thereafter in accordance with the provisions set forth in sections 552b(c)(4) and 552b(c)(6), title 5, U.S.C. and section 10(d) of Public Law 92–463, for the review, discussion and evaluation of individual grant applications. These applications and the discussions could reveal confidential trade secrets or commercial property such as patentable material, and personal information concerning individuals associated with the applications, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.

The Office of Committee Management, Division of Research Grants, Westwood Building, National Institutes of Health, Bethesda, Maryland 20892, telephone 301–496–7534 will furnish summaries of the meetings and rosters of committee members. Substantive program information may be obtained from each scientific review administrator, room number, and telephone number are listed below each study section. Since it is necessary to schedule study section meetings months in advance, it is suggested that anyone planning to attend a meeting contact the scientific review administrator to confirm the exact date, time and location. All times are a.m. unless otherwise specified.

Study section	October-November 1991 meetings	Time	Location
Allergy & Immunology, Mr. Howard M. Berman, Rm. A19, Tel. 301–496–7380.	Oct. 21–23	8:30	Holiday Inn, Chevy Chase, MD.
Bacteriology & Mycology-1, Dr. Timothy J. Henry, Rm. 236B, Tel. 301–496–7340.	Oct. 16–18	8:30	Claremont Resort Hotel, Oakland, CA.
Bacteriology & Mycology-2, Dr. William Branche, Jr., Rm. 236A, Tel. 301–496–7682.	Oct. 19–21	8:30	Claremont Resort Hotel, Oakland, CA.
Behavioral Medicine, Ms. Carol Campbell, Rm. 306B, Tel. 301–496–7109.	Oct. 2–4	8:30	Hyatt Hotel, Arlington, VA.
Biochemical Endocrinology, Dr. Michael Knecht, Rm. 204, Tel. 301–496–7430.	Oct. 2–4	8:30	NIH, Room 8, Bldg. 31C, Bethesda, MD.
Biochemistry, Dr. Adolphus P. Toliver, Rm. 318B, Tel. 301–496–7516.	Oct. 28–30	8:30	The Georgetown Inn, Georgetown, DC.
Bio-Organic & Natural Products Chemistry, Dr. Harold Radtke, Rm. 2A07, Tel. 301–496–6823.	Oct. 17–19		Holiday Inn, Bethesda, MD.
Biophysical Chemistry, Dr. John Beisler, Rm. 334, Tel. 301–496–7070.	Oct. 17–19	8:00	The Governor's House, Washington, DC.
Bio-Psychology, Dr A. Keith Murray, Rm. 325, Tel. 301–496–7058	Oct. 1–3		Omni Georgetown Hotel, Washington, DC.

Study section	October-November 1991 meetings	Time	Location
Cardiovascular, Dr. Gordon L. Johnson, Rm. 439A, Tel. 301-496-7316.	Oct. 8-11		Holiday Inn, Bethesda, MD.
Cardiovascular & Renal, Dr. Anthony Chung, Rm. 353, Tel. 301-496-7901.	Oct. 10-11	8:30	Holiday Inn Crowne Plaza, Rockville, MD.
Cellular Biology and Physiology-1, Dr. Gerald Greenhouse, Rm. 336, Tel. 301-496-7396.	Oct. 2-4		American Inn, Bethesda, MD.
Cellular Biology and Physiology-2, Dr. Gerhard Ehrenspeck, Rm. 1A05, Tel. 301-496-7681.	Oct. 16-18	8:30	Holiday Inn, Chevy Chase, MD.
Chemical Pathology, Dr. Edmund Copeland, Rm. 322, Tel. 301-496-7078.	Oct. 9-11	8:00	Holiday Inn, Bethesda, MD.
Diagnostic Radiology, Dr. Catharine Wingate, Rm. 357, Tel. 301-496-7650.	Oct. 21-23	8:30	Madison Hotel, Washington, DC.
Endocrinology, Dr. Harry Brodie, Rm. 218, Tel. 301-496-7346	Oct. 16-18	8:30	Marbury Hotel, Georgetown, DC.
Epidemiology & Disease Control-1, Dr. Scott Osborne, Rm. 203C, Tel. 301-496-7246.	Oct. 16-18	8:30	Residence Inn Marriott, Bethesda, MD.
Epidemiology & Disease Control-2, Dr. H.M. Stiles, Rm. 203B, Tel. 301-496-7246.	Oct. 9-11	8:30	Embassy Suites Hotel, Alexandria, VA.
Experimental Cardiovascular Sciences, Dr. Richard Peabody, Rm. 434, Tel. 301-496-7940.	Oct. 9-11	8:00	Embassy Suites Hotel, Chevy Chase Pavilion, Washington, DC.
Experimental Immunology, Dr. Calbert Laing, Rm. A27, Tel. 301-496-7238.	Oct. 9-11	8:30	Holiday Inn, Chevy Chase, MD.
Experimental Therapeutics-1, Dr. Philip Perkins, Rm. 221, Tel. 301-496-7839.	Oct. 9-11	8:30	Key Bridge Marriott, Rosslyn, VA.
Experimental Therapeutics-2, Dr. Marcia Litwack, Rm. 207, Tel. 301-496-8848.	Oct. 24-25	8:30	Holiday Inn, Chevy Chase, MD.
Experimental Virology, Dr. Garrett V. Keefer, Rm. 206, Tel. 301-496-7474.	Oct. 14-16	8:30	NIH, Room 8, Bldg. 31C, Bethesda, MD.
General Medicine A-1, Dr. Harold Davidson, Rm. 354A, Tel. 301-496-7797.	Oct. 7-9	8:30	NIH, Room 10, Bldg. 31C, Bethesda, MD.
General Medicine A-2, Dr. Mushtaq Khan, Rm. 354B, Tel. 301-496-7140.	Oct. 16-18	8:30	NIH, Room 6, Bldg. 31C, Bethesda, MD.
General Medicine B, Dr. Daniel McDonald, Rm. 220, Tel. 301-496-7730.	Oct. 16-18	8:00	Holiday Inn, Chevy Chase, MD.
Genetics, Dr. David Remondini, Rm. 225, Tel. 301-496-7271	Oct. 17-19	9:00	NIH, Room 7, Bldg. 31C, Bethesda, MD.
Genome, Dr. Cheryl Corsaro, Rm. 2A15, Tel. 301-496-7886	Oct. 28-30	9:00	Marriott Hotel, Pooks Hill, Bethesda, MD.
Hearing Research, Dr. Joseph Kimm, Rm. 1A03, Tel. 301-496-7494.	Oct. 7-9	8:30	Omni Shoreham Hotel, Washington, DC.
Hematology-1, Dr. Clark Lum, Rm. 355A, Tel. 301-496-7508	Oct. 24-26	8:00	Hyatt Regency Hotel, Bethesda, MD.
Hematology-2, Dr. Jerrold Fried, Rm. 355B, Tel. 301-496-7508	Oct. 21-23	8:30	Holiday Inn, Georgetown, DC.
Human Development & Aging-1, Dr. Teresa Levitin, Rm. 303, Tel. 301-496-7025.	Oct. 21-23	9:00	Omni Shoreham Hotel, Washington, DC.
Human Development & Aging-2, Dr. Louis Quatrano, Rm. 305, Tel. 301-496-7640.	Oct. 9-11	8:00	Holiday Inn, Chevy Chase, MD.
Human Development & Aging-3, Dr. Anita Sostek, Rm. 319C, Tel. 301-496-8814.	Oct. 16-18	8:30	Embassy Suites Hotel, Chevy Chase Pavilion, Washington, DC
Human Embryology & Development, Dr. Arthur Hoversland, Rm. 219B, Tel. 301-496-7597.	Oct. 22-23	8:00	Rosslyn Westpark Hotel, Arlington, VA .
Immunobiology, Dr. William Stylos, Rm. A27, Tel. 301-496-7780.	Oct. 16-18	8:30	Atlantic Oaks Hotel, Bar Harbor, ME.
Immunological Sciences, Dr. Anita Corman Weinblatt, Rm. A25, Tel. 301-496-7179.	Oct. 23-25	8:30	Holiday Inn, Chevy Chase, MD.
Mammalian Genetics, Dr. Jerry Roberts, Rm. 234, Tel. 301-496-1462.	Oct. 3-5	8:30	Holiday Inn, Bethesda, MD.
Medical Biochemistry, Dr. Alexander Liacouras, Rm. 318A, Tel. 301-496-7517.	Oct. 16-18	8:30	Holiday Inn, Chevy Chase, MD.
Medicinal Chemistry, Dr. Ronald Dubois, Rm. 2A06, Tel. 301-496-7107.	Oct. 16-18	8:30	Holiday Inn, Georgetown, DC.
Metabolic Pathology, Dr. Marcelina Powers, Rm. 435, Tel. 301-496-5251.	Oct. 23-25	8:00	Holiday Inn, Georgetown, DC.
Metabolism, Dr. Krish Krishnan, Rm. 339A, Tel. 301-496-7091	Oct. 16-18	8:00	Holiday Inn, Chevy Chase, MD.
Metallobiochemistry, Dr. Edward Zapolski, Rm. 335, Tel. 301-496-7733.	Oct. 24-26	8:30	Omni Georgetown Hotel, Washington, DC.
Microbial Physiology & Genetics-1, Dr. Martin Slater, Rm. 238, Tel. 301-496-7183.	Oct. 23-25	8:30	Holiday Inn, Crowne Plaza, Rockville, MD.
Microbial Physiology & Genetics-2, Dr. Gerald Liddel, Rm. 226, Tel. 301-496-7130.	Oct. 23-25	8:30	Holiday Inn, Crowne Plaza, Rockville, MD.
Molecular & Cellular Biophysics, Dr. Nancy Lamontagne, Rm. 326, Tel. 301-496-7060.	Oct. 31-Nov. 2	8:00	One Washington Circle Hotel, Washington, DC.
Molecular Biology, Dr. Robert Su, Rm. 233, Tel. 301-496-7830	Oct. 17-19	8:00	The Savoy Suites Hotel, Washington, DC.
Molecular Cytology, Dr. Ramesh Nayak, Rm. 233B, Tel. 301-496-7149.	Oct. 3-5	8:00	Holiday Inn, Chevy Chase, MD.
Neurological Sciences-1, Dr. Andrew Mariani, Rm. 319A, Tel. 301-496-7279.	Oct. 9-11	8:00	Holiday Inn, Chevy Chase, MD.
Neurological Sciences-2, Dr. Stephen Gobel, Rm. 304, Tel. 301-496-8808.	Oct. 8-10	8:30	Holiday Inn, Chevy Chase, MD.
Neurology A, Dr. Joe Marwah, Rm. 303A, Tel. 301-496-7095	Oct. 24-26	8:30	Delta Orlando Resort, Orlando, FL.
Neurology B-1, Dr. Lawrence Sellin, Rm. 306A, Tel. 301-496-7846.	Oct. 15-17	8:30	Hotel Washington, Washington, DC.
Neurology B-2, Dr. Herman Teitelbaum, Rm. 321, Tel. 301-496-7422.	Oct. 22-24	8:30	Holiday Inn, Bethesda, MD.

Study section	October-November 1991 meetings	Time	Location
Neurology C, Dr. Kenneth Newrock, Rm. 232, Tel. 301-496-5591.	Oct. 23-26	8:30	Omni Georgetown Hotel, Washington, DC.
Nursing Research, Dr. Gertrude McFarland, Rm. 352, Tel. 301-496-0558.	Oct. 7-9	8:30	Holiday Inn, Crowne Plaza, Rockville, MD.
Nutrition, Dr. Sooja Kim, Rm. 348, Tel. 301-496-7178	Oct. 7-9	8:30	Embassy Suites Hotel, Chevy Chase Pavilion, Washington, DC.
Oral Biology & Medicine-1, Dr. Larry Pinkus, Rm. 219A, Tel. 301-496-7818.	Oct. 7-9	8:30	Holiday Inn, Bethesda, MD.
Oral Biology & Medicine-2, Dr. Larry Pinkus, Rm. 219B, Tel. 301-496-7818.	Oct. 14-17	8:30	Holiday Inn, Bethesda, MD.
Orthopedics & Musculoskeletal, Dr. Ileen Stewart, Rm. 350, Tel. 301-496-7581.	Oct. 18-20	8:30	Banff Springs Hotel, Calgary, Alberta, Canada.
Pathobiochemistry, Dr. Zakir Bengali, Rm. 320, Tel. 301-496-7820.	Oct. 16-17	8:30	Congressional Park Days Inn, Rockville, MD.
Pathology A, Dr. Jaswant Bhorjee, Rm. 337, Tel. 301-496-7305	Oct. 29-Nov. 1	7:00 p.m.	Holiday Inn, Crowne Plaza, Rockville, MD.
Pathology B, Dr. Martin Padarathsingh, Rm. A26, Tel. 301-496-7244.	Oct. 8-11	7:00 p.m.	St. James Hotel, Washington, DC.
Pharmacology, Dr. Joseph Kaiser, Rm. 206, Tel. 301-496-7408	Oct. 23-25	8:30	American Inn, Bethesda, MD.
Physical Bochemistry, Dr. Gopa Rakhit, Rm. 349A, Tel. 301-496-7120.	Oct. 21-23	8:30	Holiday Inn, Georgetown, DC.
Physiological Chemistry, Dr. Jerry Critz, Rm. 339B, Tel. 301-496-7837.	Oct. 24-26	8:30	Holiday Inn, Chevy Chase, MD.
Physiology, Dr. Michael A. Lang, Rm. 209, Tel. 301-496-7878	Oct. 9-11	8:30	Omni Shoreham Hotel, Washington, DC.
Radiation, Dr. Paul Strudler, Rm. 328, Tel. 301-496-7073	Oct. 21-23	8:30	Residence Inn Marriott, Bethesda, MD.
Reproductive Biology, Dr. Dharam Dhindsa, Rm. 210, Tel. 301-496-7318.	Oct. 7-9	8:00	Holiday Inn, Bethesda, MD.
Reproductive Endocrinology, Dr. Abubaker A. Shaikh, Rm. 325B, Tel. 301-496-8857.	Oct. 7-9	8:00	Marbury Hotel, Georgetown, DC.
Respiratory & Applied Physiology, Dr. Everett Sinnett, Rm. 218A, Tel. 301-496-7320.	Oct. 21-22	8:30	Holiday Inn, Chevy Chase, MD.
Sensory Disorders & Language, Dr. Jane Hu, Rm. 309, Tel. 301-496-7605.	Oct. 9-11	8:30	Holiday Inn, Capitol Hill, Washington, DC.
Social Sciences & Population, Dr. Samuel Rawlings, Rm. 307, Tel. 301-496-7906.	Oct. 3-4	8:30	Holiday Inn, Chevy Chase, MD.
Surgery & Bioengineering, Dr. Paul F. Parakkal, Rm. 437, Tel. 301-496-7506.	Oct. 7-8	8:00	Holiday Inn, Chevy Chase, MD.
Surgery, Anesthesiology & Trauma, Dr. Keith Kraner, Rm. 439, Tel. 301-496-7771.	Oct. 16-18	2 p.m	Holiday Inn, Bethesda, MD.
Toxicology-1, Dr. Alfred Marozzi, Rm. 205, Tel. 301-496-7570	Oct. 16-18	8:00	American Inn, Bethesda, MD.
Toxicology-2, Dr. Alfred Marozzi, Rm. 205, Tel. 301-496-7570	Oct. 9-11	8:00	American Inn, Bethesda, MD.
Tropical Medicine & Parasitology, Dr. Jean Hickman, Rm. 1A03, Tel. 301-496-1190.	Oct. 17-18	8:00	Holiday Inn, Bethesda, MD.
Virology, Dr. Bruce Maurer, Rm. A18, Tel. 301-496-0892	Oct. 7-9	8:30	The Savoy Suites Hotel, Washington, DC.
Visual Sciences A, Dr. Anita Suran, Rm. 325B, Tel. 301-496-7000.	Oct. 30-Nov. 1	8:00	Holiday Inn, Bethesda, MD.
Visual Sciences B, Dr. Leonard Jakubczak, Rm. 325C, Tel. 301-496-7251.	Oct. 9-11	8:30	Embassy Suites Hotel, Chevy Chase Pavilion, Washington, DC.
Visual Sciences C, Dr. Allen Dearry, Rm. 319B, Tel. 301-496-7795.	Oct. 16-19	8:30	Holiday Inn, Chevy Chase, MD.

(Catalog of Federal Domestic Assistance Program Nos. 13.306, 13.333, 13.337, 13.393-13.396, 13.837-13.844, 13.846-13.878, 13.892, 13.893, National Institutes of Health, HHS.)

Dated: September 13, 1991.

Samuel C. Rawlings,

Acting Committee Management Officer, NIH.

[FR Doc. 91-22620 Filed 9-18-91; 8:45 am]

BILLING CODE 4140-01-M

DEPARTMENT OF THE INTERIOR

Bureau of Land Management

[AZ-040-09-4351-02]

Call for Nominations for the San Pedro Riparian National Conservation Area Advisory Committee

AGENCY: Bureau of Land Management, Interior.

ACTION: Call for nominations for the San Pedro Riparian National Conservation Area Advisory Committee.

SUMMARY: The purpose of this notice is to solicit public nominations to fill two positions whose terms expire this year on the San Pedro Riparian National Conservation Area Advisory Committee, which was established pursuant to section 104 of the Arizona-Idaho Conservation Act of 1988, Public Law 100-696.

DATES: All nominations should be received by October 16, 1991.

ADDRESSES: Bureau of Land Management, Safford District, 425 East Fourth Street, Safford, Arizona 85546.

SUPPLEMENTARY INFORMATION: The Committee is comprised of seven members. Under the Committee's staggered-term arrangement, the terms of two members will expire on December 31, 1991. The current members may be reappointed, or new members may be appointed. The new terms will be for 3 years, ending December 31, 1994.

Appointments made by the Secretary of the Interior pursuant to this call will ensure continued representation of specific categories of interest on the Committee. Nominees for one of the two expiring terms must be persons with recognized backgrounds in Wildlife. The other committee member will represent Cochise County, and will be nominated by the Cochise County Board of Supervisors.

The purpose of the Committee is to provide informed advice to the Bureau's Safford District Manager on the management of the San Pedro Riparian National Conservation Area, as required by section 103 of the Arizona-Idaho Conservation Act of 1988, Public Law 10-696.

Members will serve without salary but will be reimbursed for travel and per diem expenses at current rates for government employees. The Committee normally meets at least twice yearly Additional meetings may be called by the District Manager or his designee in connection with special needs for advice.

Persons wishing to serve on the Committee or to nominate individuals to serve on the Committee must do so in writing. Each nomination must include the name, address, and phone number of the nominee, along with biographical information such as profession, experience, and related interests. Nominations for the Wildlife representative should be addressed to Safford District Manager at the address below. Nominations for the Cochise County representative should be sent to the Cochise County Board of Supervisors, P.O. Box 225, Bisbee, Arizona 85603.

FOR FURTHER INFORMATION CONTACT: Diane Drobka, Public Affairs Officer, at the address above, or phone 602–428–4040.

Dated: September 9, 1991.

Ray Brady,

District Manager.

[FR Doc. 91–22588 Filed 9–18–91; 8:45 am]

BILLING CODE 4310-32-M

[CA-050-01]

South Fork Eel Wild and Scenic River, CA; Environmental Statement; Availability, Etc.

AGENCY: Department of the Interior, Bureau of Land Management.

ACTION: Notice of intent to prepare a supplemental draft environmental impact statement for the South Fork Eel River Management Plan and Elkhorn Ridge Timber Sale.

SUMMARY: The Bureau of Land Management, Ukiah District's Arcata Resource Area issued a Draft Management Plan and Environmental Impact Statement (EIS) for the South Fork Eel River (BLM-CA-ES-90-002-1793) in August 1990. Public comment on the Draft EIS plus new information related to management of Northern Spotted Owl and its Critical Habitat (as identified by the U.S. Fish and Wildlife Service) have indicated the need to further evaluate effects of the Proposed Action in relation to the wild and scenic river values (anadromous fisheries) and the harvest of timber from Elkhorn Ridge. Therefore, the Bureau has determined that further analysis will be completed in a Supplemental Draft EIS.

DATES: The Supplemental Draft EIS is scheduled for release to the public by December 20, 1991 with a 45 day comment period to follow

FOR FURTHER INFORMATION CONTACT: Linda Hansen, Planning and Environmental Coordinator, Bureau of Land Management, Ukiah District, 555 Leslie Street, Ukiah, CA 95482; or Lynda Roush, Arcata Resource Area Manager, 1125 16th Street, room 219, Arcata, CA 95521.

SUPPLEMENTARY INFORMATION: Since the release of the Draft Plan and EIS, the Northern Spotted Owl has been formally listed as a Threatened Species under the provisions of the Federal Endangered Species Act. In addition, the U.S. Fish and Wildlife Service have identified areas of Critical Habitat for the Northern Spotted Owl which could affect management of the South Fork Eel River watershed. Public comment on the Draft EIS suggested that further evaluation of the effects of timber harvest needed to be completed in light of the formal listing for the Northern Spotted Owl, and a better evaluation of effects to the outstandingly remarkable value (anadromous fisheries) of the wild and scenic South Fork Eel River needed to be completed.

The Arcata Resource Area has determined that further analysis will be completed in a Supplemental Draft EIS.

Dated: September 3, 1991.

Alfred W. Wright,

District Manager, Ukiah.

[FR Doc. 91–22525 Filed 9–18–91; 8:45 am]

BILLING CODE 4310-40-M

[AZ-020-00-4320-12]

Phoenix/Lower Gila Resource Areas Grazing Advisory Board; Meetings

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of meeting—Phoenix/Lower Gila Resource Areas Grazing Advisory Board.

SUMMARY: The Phoenix/Lower Gila Resource Areas Grazing Advisory Board will hold a meeting on Thursday, November 21, 1991. The meeting will start at 9 a.m. in the Phoenix District Office Conference Room, 2015 West Deer Valley Road, Phoenix, Arizona 85027.

The agenda for the meeting will include:

1. Report on District Boundary Changes
2. Update of the Bureau's Exchange Program
3. Status of the Bureau s Planning and Environmental Impact Statements
4. Report on Range Improvements for FY 91 and FY 92
5. Range Policy Update
6. Request for Advisory Board Expenditures
7. Arrangements for Future Meetings

The meeting is open to the public. Anyone wishing to make oral or written statements to the Board is requested to do so through the office of the District Manager, 2015 West Deer Valley Road, Phoenix, Arizona 85027, at least seven (7) days prior to the meeting date.

Summary minutes of the Board meeting will be maintained in the District Office and be made available for public inspection and reproduction (during regular business hours) within 30 days following the meeting.

Dated: September 12, 1991.

Charles R. Frost,

Assistant District Manager.

[FR Doc. 91–22587 Filed 9–18–91; 8:45 am]

BILLING CODE 4310-32-M

[OR-050-4333-10; GP1-369]

Oregon; Prineville District Advisory Council Meeting

AGENCY: U.S. Department of Interior, Bureau of Land Management Prineville District, Prineville, Oregon.

Notice is hereby given that a meeting of the Prineville District Advisory Council will be held on October 22, 1991. The meeting will begin at 10 a.m. in the conference room of the Bureau of Land Management Office located at 185 East Fourth Street, Prineville, Oregon 97754. The agenda will include: (1) An update on coordinated resource management planning ongoing in the district; (2) an update on the district wild and scenic rivers program; (3) a status report on the district land exchange program and (4) obtaining recommendations from the council on BLM's position regarding the issues being addressed in the Draft Lower Deschutes River Management Plan/Environmental Impact Statement.

Dated: September 11, 1991.

James L. Hancock,

District Manager.

[FR Doc. 91–22586 Filed 9–18–91; 8:45 am]

BILLING CODE 4310-33-M

[AZ-040-01-4320-02]

Meeting of the Safford District Advisory Council

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of meeting.

SUMMARY: Notice is hereby given in accordance with Public Law 94–579 and 43 CFR part 1780, that a meeting of the Safford District Advisory Council will be held.

DATES: Thursday, October 10, 1991, 10 a.m.

ADDRESSES: BLM Office, 425 E. 4th St., Safford, Arizona 85546.

SUPPLEMENTARY INFORMATION: The agenda for the meeting includes the following items: 1. Heritage Program—Arizona Game and Fish Department. 2. AZCO Mine Proposal. 3. Management Updates: a. Resource Management Plan; b. Gila Box management plan and advisory committee.

The meeting will be open to the public. Interested persons may make oral statements to the Board between 1–2 p.m., or may file written statements for consideration by the Council. Anyone wishing to make an oral statement must notify the District Manager by Tuesday, October 8, 1991. Depending upon the number of people wishing to make oral statements, a per person time limit may be considered.

Summary minutes of the Board meeting will be maintained in the District office and will be available for public inspection and reproduction (during business hours) within thirty (30) days following the meeting.

FOR FURTHER INFORMATION: Diane Drobka, Public Affairs Officer, Safford District, 425 E. 4th St., Safford, AZ 85546. Telephone (602) 428–4040.

Dated: September 9, 1991.

Ray Brady,

District Manager.

[FR Doc. 91–22590 Filed 9–18–91; 8:45 am]

BILLING CODE 4310–84–M

[MT-920-91-4111-11; MTM 75437]

Proposed Reinstatement of Terminated Oil and Gas Lease

Under the provisions of Public Law 97–451, a petition for reinstatement of oil and gas lease MTM 75437, Carbon County, Montana, was timely filed and accompanied by the required rental accruing from the date of termination.

No valid lease has been issued affecting the lands. The lessee has agreed to new lease terms for rentals and royalties at rates of $5 per acre and 16-2/3% respectively. Payment of a $500 administration fee has been made.

Having met all the requirements for reinstatement of the lease as set out in section 31 (d) and (e) of the Mineral Lands Leasing Act of 1920 (30 U.S.C. 188), the Bureau of Land Management is proposing to reinstate the lease, effective as of the date of termination, subject to the original terms and conditions of the lease, the increased rental and royalty rates cited above, and reimbursement for cost of publication of this Notice.

Dated: September 11, 1991

June A. Bailey,

Chief, Leasing Unit.

[FR Doc. 91–22589 Filed 9–18–91; 8:45 am]

BILLING CODE 4310–DN–M

[G-910-GP1-0429-4111-15; NMNM-71758]

New Mexico: Proposed Reinstatement of Terminated Oil and Gas Lease

Under the provisions of Public Law 97–451, a petition for reinstatement of Oil and Gas Lease NMNM–71758, Chaves County, New Mexico, was timely filed and was accompanied by all required rentals and royalties accruing from June 1, 1991, the date of termination.

No valid lease has been issued affecting the land. The lessee has agreed to new lease terms for rentals and royalties at rates of $10.00 per acre and 16⅔ percent, respectively. Payment of a $500.00 administrative fee has been made.

Having met all the requirements for reinstatement of the lease as set out in section 31 (d) and (e) of the Mineral Leasing Act of 1920, as amended (30 U.S.C. 188 (d) and (e)), the Bureau of Land Management is proposing to reinstate the lease effective June 1, 1991, subject to the original terms and conditions of the lease and the increased rental and royalty rates cited above, and the reimbursement for cost of publication of this notice.

Dated: September 11, 1991.

Dolores L. Vigil,

Chief, Adjudication Section.

[FR Doc. 91–22592 Filed 9–18–91; 8:45 am]

BILLING CODE 4310–FB–M

[CA-940-4214-10; CAS 30, CAS 31, CAS 4986, CAS 5302, CAS 050595, CAS 054898, CAS 076606, CAS 079877, CALA 0153380, CARI 01958, CACA 978, CACA 1568, CACA 1729]

Termination of Segregative Effect, Opening of Lands; California

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: This is to provide notice of the termination of the temporary segregative effect of 13 different proposed withdrawals and opening of the lands to the operation of the public land laws generally, and to location and entry under the United States mining laws, subject to valid existing withdrawals, withdrawal applications, and the requirements of applicable law on approximately 149,100 acres of National Forest System Lands and Public Lands.

When Congress passed the Federal Land Policy and Management Act of October 21, 1976 (FLPMA) (43 U.S.C. 1714), it completely changed the requirements by which Federal agencies apply for withdrawals of land. Prior to that time, Federal agencies could apply for land withdrawals with a minimum of documentation, and their application segregated the lands indefinitely, even if never perfected. In FLPMA, Congress provided that applications segregate for only two years, during which time the application was to be perfected according to the criteria of FLPMA.

Applications for withdrawal which were on file with the Department of the Interior when FLPMA was enacted, were allowed to segregate for an additional 15 years, during which the applicant agencies had the burden of perfecting the applications. Congress specified the segregation on these applications would terminate within 15 years. October 20, 1991 will be the final day of the 15-year period. The following pre-FLPMA withdrawal applications have not been perfected at this time, although applicants may be successful in re-segregating the lands by October 20.

EFFECTIVE DATE: October 20, 1991.

FOR FURTHER INFORMATION CONTACT: John Beck, BLM California State Office, 2800 Cottage Way, room E–2845, Sacramento, California 95825, (916) 978–4820.

SUPPLEMENTARY INFORMATION: Pursuant to section 204(g) of the Federal Land Policy and Management Act of October 21, 1976 (43 U.S.C. 1714) and the regulations in 43 CFR 2310.2–1(e) the temporary segregation of the land, caused by applications for withdrawals, which were filed prior to the Act of October 21, 1976, shall terminate on October 20, 1991. A specific description of the lands currently involved, too lengthy to list in this notice, is available in the following listed case files which are located in the California State Office.

1. With one exception, Notices of the Proposed Withdrawals and Reservation of Lands were originally published in the **Federal Register** as follows:

(a) CAS 30, Bureau of Reclamation, for the construction, operation and maintenance of the planned facilities of the Auburn-Folsom South Unit of the Central Valley Project. 31 FR 13248 (October 13, 1966 (FR Doc. 66–11143)) containing approximately 2,602 acres in Placer County.

(b) CAS 31, Bureau of Reclamation, for the construction, operation and maintenance of the planned facilities of the Auburn-Folsom South Unit of the Central Valley Project. 31 FR 13608 (October 21, 1966 (FR Doc. 66–11481)) containing approximately 40 acres in Placer County.

(c) CAS 4986, Bureau of Reclamation, for the construction, operation, and maintenance of the planned facilities of the Auburn Dam and Reservoir, Auburn-Folsom South Unit, American River Division of the Central Valley Project. 37 FR 9046 (May 4, 1972 (FR Doc. 72–6768)) containing approximately 573 acres in Placer County.

(d) CAS 5302, Bureau of Reclamation, for the construction, operation, and maintenance of the Auburn Dam and Reservoir, Auburn-Folsom South Unit, American River Division and Central Valley Project. 37 FR 25419 (November 30, 1972 (FR Doc. 72–20530)) containing approximately 10 acres in Placer County.

(e) CAS 050595, Forest Service, for protection of public recreation areas in the Tahoe National Forest. 27 FR 12004–12006 (December 5, 1962 (FR Doc. 62–11996)) containing approximately 4,432 acres in Nevada, Placer, and Sierra counties.

(f) CAS 054898, Bureau of Reclamation, for management of the Trinity River Division, Central Valley Project. 24 FR 173 (January 7, 1959 (FR Doc. 59–114)) containing approximately 195 acres in Shasta and Trinity counties.

(g) CAS 076606, Bureau of Reclamation, for construction, operation, and maintenance of the Sly Park Unit, American River Division of the Central Valley Project. 28 FR 10430 (September 26, 1963 (FR Doc. 63–10233)) containing approximately 100 acres in El Dorado County.

(h) CAS 079877, Bureau of Reclamation, for the planned facilities of the Auburn-Folsom South Unit of the Central Valley Project and for planned supplemental recreational and fish and wildlife purposes. 30 FR 13747–13748 (October 28, 1965 (FR Doc. 65–11539)) containing approximately 5,297 acres in Placer County.

(i) CALA 0153380, Bureau of Reclamation, for right-of-way for canals, dikes, distribution systems, settling basins and for sand, gravel and clay deposits for use in connection with the Coachella Division of the All-American Canal System. 22 FR 9302 (November 21, 1957 (FR Doc. 57–9629)) containing approximately 640 acres in Riverside County.

(j) CACA 978, Department of the Navy, for the Chocolate Mountain Aerial Gunnery Range. 40 FR 29737–29738 (July 15, 1975 (FR Doc. 75–18248)) containing approximately 132,928 acres in Imperial County.

(k) CACA 1568, Forest Service, for campground, picnic and recreation facilities within the Tahoe National Forest. 39 FR 13566 (April 15, 1974 (FR Doc. 74–8612)) containing approximately 60 acres in Sierra County.

(l) CACA 1729, Bureau of Reclamation, for location of a reservoir and related facilities to be built as a part of the federally constructed El Dorado Irrigation District distribution system. 39 FR 40178 (November 14, 1974 (FR 74–26685)) containing approximately 22.5 acres in Placer County.

(m) CARI 1958, Bureau of Reclamation, for the Santa Margarita Project. This proposed withdrawal was not published in the **Federal Register**; however, the lands were segregated upon the filing of the application for withdrawal on December 18, 1968 containing approximately 2,200 acres in Riverside and San Diego counties.

The areas currently withdrawn aggregate approximately 149,100 acres of National Forest System lands and public lands.

2. At 10 a.m. on October 20, 1991, the lands described in the case records listed in paragraph 1 will be opened to the operation of the public land laws generally, and to location and entry under the United States mining laws, subject to valid existing withdrawals, and the requirements of applicable law. Appropriation of any of the lands described in this order under the general mining laws prior to the date and time of restoration is unauthorized. Any such attempted appropriation, including attempted adverse possession under 30 U.S.C. 38, shall vest no rights against the United States. Acts required to establish a location and to initiate a right of possession are governed by State law where not in conflict with Federal law. The Bureau of Land Management will not intervene in disputes between rival locators over possessory rights since Congress has provided for such determinations in local courts.

Since the lands covered under these proposed withdrawals are still being considered for withdrawal by the applying agency, new applications and further segregation may encumber these lands prior to the effective date of this notice. Therefore, all locators are responsible for ensuring that the lands opened under this notice are free of other existing withdrawals or withdrawal applications and that the requirements of applicable law are met.

Dated: September 13, 1991.

Nancy J. Alex,

Chief, Lands Section.

[FR Doc. 91–22568 Filed 9–18–91; 8:45 am]

BILLING CODE 4310-40-M

[MT-930-4212-13; MTM 74131]

Notice of Conveyance and Order Providing for Opening of Public Land in Powell and Lewis and Clark Counties, Montana

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice.

SUMMARY: This order will open lands reconveyed to the United States in an exchange under the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1701 et seq (FLPMA), to the operation of the public land laws. The land that was acquired in the exchange provides additional recreational access, river access and acquisition of bald eagle habitat. The land has high recreation value and valuable wildlife habitat. The public interest was well served through completion of this exchange.

EFFECTIVE DATE: November 13, 1991.

FOR FURTHER INFORMATION CONTACT: James Binando, BLM Montana State Office, P.O. Box 36800, Billings, Montana 59107, 406–255–2935.

SUPPLEMENTARY INFORMATION: 1. Notice is hereby given that pursuant to section 206 of FLPMA, the following described lands were transferred to Champion International Corporation:

Principal Meridian, Montana

T. 14 N., R. 12 W.,
Sec. 18, lots 1, 3, 4, SW¼NE¼, SE¼SW¼, S½SE¼, NE¼SE¼.
T. 14 N., R. 13 W.,
Sec. 14, E½NE¼, E½SW¼, SE¼.
T. 13 N., R. 14 W.,
Sec. 2, lot 1, SE¼NE¼.
T. 11 N., R. 15 W.,
Sec. 18, lot. 4.
T. 12 N., R. 15 W.,
Sec. 26, NE¼, N½NW¼, NE¼SE¼.
T. 12 N., R. 16 W.,
Sec. 3, lots 13, 14, NE¼SE¼;
Sec. 4, lot 12, SW¼, W½SE¼;
Sec. 14, S½NE¼, E½SE¼.

Aggregating 1,562.79 acres.

2. In exchange for the above selected land, the United States acquired the following described surface estate from Champion International Corporation:

Principal Meridian, Montana

T. 14 N., R. 9 W.,
Sec. 19, lots 4, SE¼SW¼, S½SE¼;
Sec. 29, NW¼.
T. 11 N., R. 10 W.,
Sec. 21, NW¼SW¼, S½S½;
Sec. 23, W½;
Sec. 27, all.
T. 14 N., R. 10 W.,
Sec. 29, N½.

Aggregating 1,800.17 acres, more or less.

3. The values of the Federal public land and the private land were appraised at $1,005,000 each, and no cash equalization payment was required.

4. At 9 a.m. on November 13, 1991, the lands described in paragraph 2 above that were conveyed to the United States will be opened only to the operation of the public land laws generally, subject to valid existing rights and the requirements of applicable law. All valid applications received at or prior to 9 a.m. on November 13, 1991, shall be considered as simultaneously filed at that time. Those received thereafter shall be considered in the order of filing.

Dated: September 9, 1991.

John A. Kwiatkowski,
Deputy State Director; Division of Lands and Renewable Resources.

[FR Doc. 91-22591 Filed 9-18-91; 8:45 am]
BILLING CODE 4310-DN-M

[OR-056-4212-14; GP1-368]

Realty Action: Deschutes County, OR

AGENCY: U.S. Department of Interior, Bureau of Land Management, Prineville District, Prineville, Oregon.

ACTION: Noncompetitive Sale of Public Lands in Deschutes County, Oregon.

SUMMARY: The following land has been found suitable for direct sale under Section 203 of the Federal Land Policy and Management Act of 1976 (90 Stat. 2750, 43 U.S.C. 1713) at fair market value. The land will be offered for sale sixty days after the date of this notice.

Willamette Meridian

T. 22 S., R. 10 E.
BRENEMAN
Section 27, Lot 2, containing 2.26 acres (OR-47566)
LEBEAU
Section 34, Lot 1, containing 2.02 acres (OR-47567)
T. 23 S., R. 10 E.
WORDEN
Section 5, Lot 7, containing 1.05 acres (OR-47569)
MILTENBERGER
Section 5, Lot 9, containing .16 acres (OR-47568)
T. 15 S., R. 12 E.
PANTEKOEK
Section 4, Lot 6, containing .15 acres (OR-47565)

The land described is hereby segregated from appropriation under the public land laws, including the mining laws, pending disposition of this action or 270 days from the date of publication of this notice, whichever occurs first.

This land is being offered by direct sale to resolve unintentional trespass by the adjacent landowner. All costs incurred by BLM, including the Cadastral Survey, are subject to reimbursement by the buyers. No significant resource values will be affected by this proposal. The sale is consistent with the intent of the Resource Management Plan.

The mineral interests being offered for conveyance have minimal value and are being considered for transfer in accordance with section 209 of the Federal Land Policy and Management Act. The purchaser must submit a $50.00 filing fee for the transfer upon request from BLM. The patent, when issued, would be subject to valid and existing rights.

Detailed information concerning this action is available at the Prineville District Office, BLM, 185 E. Fourth Street, Prineville, Oregon 97754.

For a period of 45 days from the date of publication of this notice in the **Federal Register**, interested parties may submit comments to the District Manager, at the above address. In the absence of timely objections, this proposal shall become the final determination of the Department of Interior.

Dated: September 10, 1991.

Carolyn K. Choate,
Acting District Manager.

[FR Doc. 91-22527 Filed 9-18-91; 8:45 am]
BILLING CODE 4310-33-M

[WY-030-01-4212-13; WYW-117481]

Realty Action; Exchange; WY

AGENCY: Bureau of Land Management, Interior.

ACTION: Notice of realty action, proposed exchange of public lands in Fremont County for private lands in Fremont County.

SUMMARY: The following public surface estate has been determined to be suitable for disposal by exchange under section 206 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. 1716:

Sixth Principal Meridian

T. 33 N., R. 101 W.,
Sec. 21, NE¼NE¼, NE¼SE¼.

The above aggregates 80 acres.

Final determination of suitability for disposal will be made through the Environmental Assessment process pursuant to the National Environmental Policy Act of 1969, as amended.

In exchange for these lands, the United States proposes to acquire the following private surface estate from Roy J. Steers:

Sixth Principal Meridian

T. 33 N., R. 101 W.,
Sec. 17, SE¼NW¼, NE¼SW¼.

The above aggregates 80 acres.

FOR FURTHER INFORMATION CONTACT: Jack Kelly, Area Manager, Lander Resource Area, 125 Sunflower, P.O. Box 589, Lander, Wyoming 82520, (307) 332-7822).

SUPPLEMENTARY INFORMATION: The BLM proposes to exchange public land with Roy Steers in order to acquire a key inholding within an area that is important big game habitat and which provides important recreational values in the form of big game hunting. The 80 acres proposed for acquisition is located within a larger block of public and private land which is managed to provide wildlife habitat and recreation through hunting during the big game seasons. The Wyoming Game and Fish Department has acquired an easement agreement on approximately 2000 acres of private land which, in combination with public land, surrounds the 80 acres of private land proposed for acquisition. That easement agreement resulted in reservation of the forage for elk and other big game animals, and opened the private lands to the public during the hunting seasons. The proposed exchange would result in the acquisition of the 80 acre inholding by the BLM.

The public lands proposed for disposal in the exchange are an isolated 40 acre tract and a 40 acre tract on the edge of blocked public land.

The exchange involves equal market values as well as equal acreage. The publication of this notice in the **Federal Register** segregates the public lands described above from settlement, sale, location, and entry under the public land laws, including the mining laws, but not from exchange pursuant to section 206 of the Federal Land Policy and Management Act of 1976, for a period of 2 years from the date of first publication.

Conveyance of the above public lands will be subject to:

1. The reservation to the United States of a right-of-way for ditches and canals in accordance with the Act of August 30, 1890, 43 U.S.C. 945.

2. The reservation of all leasable minerals along with the right of ingress and egress for exploration and development.

3. Existing rights of record.

4. United States Road Right-of-Way Reservation WYW-123017.

This exchange is consistent with Bureau of Land Management policies and planning. The public interest will be served by completion of this exchange.

For a period of forty-five (45) days from the date of first publication of this notice, interested parties may submit comments to the Bureau of Land Management, Area Manager, Lander Resource Area Office, P.O. Box 589, Lander, Wyoming 82520. Any adverse comments will be evaluated by the State Director who may sustain, vacate, or modify this proposed realty action. In the absence of any objections, this proposed realty action will become final.

Dated: September 9, 1991.

Jack Kelly,

Area Manager.

[FR Doc. 91-22518 Filed 9-18-91; 8:45 am]

BILLING CODE 4310-22-M

Fish and Wildlife Service

Receipt of Applications for Permit

The following applicants have applied for a permit to conduct certain activities with endangered species. This notice is provided pursuant to Section 10(c) of the Endangered Species Act of 1973, as amended (16 U.S.C. 1531, *et seq.*):

PRT-759741

Applicant: University of Michigan, Museum of Zoology, Ann Arbor, MI 48109

The applicant requests a permit to import one specimen of Anegada ground iguana (*Cyclura pinguis*) salvaged on Anegada Island and one specimen of Virgin Islands tree boa (*Epicrates monensis granti*) salvaged on Tortola Island from Fred Kraus, St. Thomas, British Virgin Islands, for accessioning into the collection of the Museum of Zoology. Specimens will be made available for scientific research.

PRT-760122

Applicant: James G. Whitehead, Rehoboth, MA

The applicant requests a permit to purchase in interstate commerce a pair of captive-hatched Hawaiian (=nene) geese [*Nesochen* (=*Branta*) *sandvicensis*] from Charles Nugent, Kimbolton, Ohio for the purpose of captive propagation.

PRT-761608

Applicant: Roger Williams Park Zoo, Providence, RI

The applicant requests a permit to purchase in interstate commerce a pair of captive-hatched Darwin's rheas (*Pterocnemia pennata*) from International Animal Exchange, Ferndale, MI for the purpose of enhancement of propagation and survival of the species.

PRT-761611

Applicant: Reid Park Zoo, Tucson, AZ

The applicant requests a permit to purchase in interstate commerce a pair of captive-hatched Darwin's rheas (*Pterocnemia pennata*) from International Animal Exchange, Ferndale, MI for the purpose of enhancement of propagation and survival of the species.

PRT-697830

Applicant: U.S. Fish and Wildlife Service, Regional Director, Region 3

The applicant requests amendment to their current permit to include take of the winged mapleleaf mussel (*Quandrula fragosa*), Mitchell's satyr butterfly (*Neonympha mitchellii mitchellii*) and Leedy's roseroot (*Sedum integrifolium leedyi*) for the purposes of scientific research and enhancement of propagation or survival of the species in accordance with recovery documents or other Service work.

Written data or comments should be submitted to the Director, U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, room 432, Arlington, Virginia 22203 and must be received by the Director within 30 days of the date of this publication.

Documents and other information submitted with these applications are available for review by any party who submits a written request for a copy of such documents to, or by appointment during normal business hours (7:45-4:15) in, the following office within 30 days of the date of publication of this notice: U.S. Fish and Wildlife Service, Office of Management Authority, 4401 North Fairfax Drive, Room 432, Arlington, Virginia 22203. Phone: (703/358-2104); FAX: (703/358-2281).

Dated: September 13, 1991.

Maggie Tieger,

Acting Chief, Branch of Permits, Office of Management Authority.

[FR Doc. 91-22534 Filed 9-18-91; 8:45 am]

BILLING CODE 4310-55-M

Intent to Prepare an Environmental Impact Statement and a Plan to Direct All Natural Resource and Public Use Management Activities on the Hart Mountain National Antelope Refuge, Lake County, Oregon

AGENCY: U.S. Department of the Interior, Fish and Wildlife Service.

ACTION: Notice.

SUMMARY: This notice advises the public that the U.S. Fish and Wildlife Service (Service) intends to gather information necessary for the preparation of an Environmental Impact Statement (EIS) and a plan to direct all natural resource and public use management activities on the Hart Mountain National Antelope Refuge, Lake County, Oregon. The public is invited to comment on the scope and content of the EIS. This notice is being furnished pursuant to the National Environmental Policy Act's (NEPA) Regulations (40 CFR 1501.7) to obtain suggestions and information from other agencies and the public on the scope of issues to be addressed in the EIS.

DATES: Written comments should be received by October 21, 1991.

ADDRESSES: Comments should be addressed to: Refuge Manager; Hart Mountain National Wildlife Refuge; P.O. Box 111; Lakeview, OR 97630.

FOR FURTHER INFORMATION CONTACT: Mr. Michael Smith; Assistant Refuge Manager; Sheldon-Hart Mountain National Wildlife Refuge Complex; P.O. Box 111; Lakeview, OR 97630; Telephone: (503) 947-3315.

SUPPLEMENTARY INFORMATION: The Service proposes to examine alternatives for the management of fish and wildlife habitats and public use activities on the Hart Mountain National Antelope Refuge. The purpose of this EIS is to analyze the refuge resources and, in full awareness of public viewpoints, to recommend a course of action to best guide the management of these resources in the future to benefit fish and wildlife. The EIS will provide decision-makers with a comprehensive analysis of alternative actions that will result in an integrated management plan.

The EIS also will include a determination of the compatibility of the alternative actions with the purposes for which the refuge was established and acquired, the goals of the National Wildlife Refuge System, and the refuge goals and objectives. As required by the National Wildlife Refuge Administration Act of 1966 as amended (16 U.S.C. 668dd *et seq.*), any use of a national wildlife

refuge must be compatible with the primary purposes for which the refuge was established. Hart Mountain Refuge was established by executive order in 1936 "* * * as a range and breeding ground for antelope and other species of wildlife * * *." Additional lands later were purchased "* * * for use as an inviolate sanctuary, or for any other management purpose, for migratory birds."

The purpose of and the need for action is that current management plans are outdated and fragmented and current economic and public uses occurring on the refuge have not undergone normal compatibility determination. Until now, management has been guided by the Service's Refuge Manual, a resource plan prepared with assistance from the U.S. Soil Conservation Service in 1969, and individual management plans for activities such as hunting, fire, and law enforcement. The need for an integrated and comprehensive management plan has been recognized for many years. In addition, a national survey of secondary uses on national wildlife refuges in 1990 indicated that some economic and public uses occurring on Hart Mountain Refuge are "harmful"—that is, they adversely affect the ability of the refuge manager to conserve or manage in accordance with the refuge goals and objectives. These uses need to be modified or eliminated if they cannot be made harmless, and all permitted uses need to undergo formal compatibility determination.

The EIS will address a range of alternatives for future management of fish and wildlife and public use on the Hart Mountain Refuge. Alternatives will be examined for their potential benefits and impacts to the various fish and wildlife resources present on the refuge, the surrounding environment, and public use of the refuge. Potential social and economic impacts also will be analyzed.

The Service urges all interested parties to provide comments regarding the scope of this EIS, the alternatives to be developed, and the potential significant environmental impacts which many occur from implementation of alternative actions. Persons who have previously commented during scoping of this proposed management plan, which was initiated in December 1990, need not resubmit their comments. All comments currently in the project file will be used in development of this EIS. The ideas and concerns of interested parties may be expressed in writing to the address listed above. Written comments must be received by the Service by October 21, 1991.

The environmental review of this project will be conducted in accordance with the requirements of NEPA (42 U.S.C. 4371 *et seq.*), NEPA Regulations (40 CFR Part 1500, *et seq.*), other appropriate Federal regulations, and Service procedures for compliance with those regulations.

It is estimated that a Draft EIS will be made available for public review and comment during November 1992.

Dated: August 23, 1991.

Marvin L. Plenert,

Regional Director, Fish and Wildlife Service.

[FR Doc. 91-22585 Filed 9-18-91; 8:45 am]

BILLING CODE 4310-55-M

Minerals Management Service Shelf

Revised Outer Continental Staff Official Protraction Diagrams

AGENCY: Minerals Management Service, Interior.

ACTION: Publication of Revised Outer Continental Shelf Official Protraction Diagrams.

SUMMARY: Notice is hereby given that effective with this publication, the following OCS Official Protraction Diagram, last revised on the date indicated, is on file and available for information only, in the Gulf of Mexico OCS Regional Office, New Orleans, Louisiana. In accordance with title 43, Code of Federal Regulations, these Official Protraction Diagrams are the basic record for the description of mineral and oil and gas lease sales in the geographic areas they represent.

REVISED MAPS [1]

Description	Latest revision date
Port Isabel, NG 14-6	June 19, 1991

[1] Changes include minor coordinate adjustments to Blocks 989 and 990 at the intersections of the Federal/State and 8(g) boundaries with the United States—Mexico Provisional Maritime Boundary.

ADDRESSES: Copies of these Official Protraction Diagrams may be purchased for $2.00 each from Public Information Unit (MS-5034), Minerals Management Service, Gulf of Mexico OCS Regional Office, 1201 Elmwood Park Boulevard, New Orleans, Louisiana 70123-2394 (504) 736-2519. Map sets are available on microfiche for $5.00 per set.

Technical comments or questions pertaining to these maps should be directed to Office of Leasing and Environment, Supervisor, Sales and Support Unit (504) 736-2768.

Dated: September 12, 1991.

J. Rogers Pearcy,

Regional Director, Gulf of Mexico OCS Region.

[FR Doc. 91-22597 Filed 9-18-91; 8:45 am]

BILLING CODE 4310-MR-M

National Park Service

Steering Committee for the "Protecting Our National Parks" Symposium; Meeting

AGENCY: National Park Service, Interior.

ACTION: Notice of public meeting at the "Protecting Our National Parks" Symposium in Vail, CO; and Opportunity for Public Comment on Symposium Recommendations.

Notice is hereby given in accordance with the Federal Advisory Committee Act, 5 U.S.C. appendix (1988), that a public meeting will be held by the Steering Committee for the "Protecting Our National Parks" Symposium (also now commonly entitled, "Our National Parks: Challenges and Strategies for the 21st Century"). The public meeting will be the Closing General Session of the Symposium, to be held at 3 p.m. Thursday, October 10, 1991 in the Grand Ballroom of the Marriott Mark Resort, 715 Lions Head Circle, Vail, Colorado.

By notice in the Federal Register of January 3, 1991, the Symposium Steering Committee was established as an advisory committee to advise the Director of the National Park Service. Acting under its charter, the Steering Committee has planned the symposium, which is a cooperative undertaking among the National Park Service and several other entities to focus on National Park System issues and opportunities for improved park stewardship. At a March 13, 1991 public meeting in San Francisco, the Steering Committee established four Working Groups to assemble information on specific issues and to preside over discussion of the issues at the Symposium, which is scheduled for October 7-10, 1991 in Vail. The March 13 meeting defined and structured the issues that would be explored at the Symposium, and accepted public inputs on them. The four Working Groups have since produced issue papers with preliminary recommendations to the Steering Committee, which will be deliberated by the approximately 600 attendees at the Symposium. After that deliberation, amended but still preliminary Working Group recommendations will be presented at the Closing General Session. The general public is invited to attend the Closing General Session to hear the

preliminary recommendations of the Working Groups. Those in attendance may have the opportunity to comment orally on the recommendations. The Chairman of the session will limit oral comments so as to allow the completion of the session 5 p.m. (2 hours).

After the symposium, the Working Groups will put their recommendations in final form and submit them to the Steering Committee, which is to consider the recommendations in preparing its report to the Director of the National Park Service. The Steering Committee hereby solicits public comment on the final Working Group recommendations, which will be available for public review from approximately November 18 to December 13, 1991. Comments on the final Working Group recommendations will be due by December 13, 1991 to the Steering Committee Chairman, Mr. William J. Briggle, Deputy Regional Director, Pacific Northwest Region, National Park Service, 83 South King Street, suite 212, Seattle, Washington 98104.

Anyone who will not be attending the symposium but who wishes to receive the final Working Group recommendations for review, should submit a request to Mr. Briggle at the address indicated above, no later than November 1, 1991. There will be a signup sheet at the symposium for attendees who wish to receive and review the final Working Group recommendations.

After the receipt of all comments, which are due December 13, the Steering Committee will hold a meeting to review the Working Group recommendations and the public comments and to formulate its report to the Director. The meeting will be held in conformance with the provisions of the Federal Advisory Committee Act, including an opportunity for any additional public comments. Separate public notice of that meeting will be published in the Federal Register at a later date.

Herbert S. Cables, Jr.,
Deputy Director.

[FR Doc. 91-22567 Filed 9-18-91; 8:45 am]
BILLING CODE 4310-70-M

Office of Surface Mining Reclamation and Enforcement

Information Collection Submitted to the Office of Management and Budget for Review Under the Paperwork Reduction Act

The proposal for the collection of information listed below has been submitted to the Office of Management and Budget for approval under the provisions of the Paperwork Reduction Act (44 U.S.C. chapter 35). Copies of the proposed collection of information, related form and explanatory material may be obtained by contacting the Bureau's clearance officer at the phone number listed below. Comments and suggestions on the requirements should be made directly to the Bureau clearance officer and to the Office of Management and Budget, Paperwork Reduction Project (1029–0039), Washington, DC 20503, telephone 202–395–7340.

Title: Underground Mining Permit Applications—Minimum Requirements for Reclamation and Operation Plan—30 CFR part 784.

OMB Number: 1092–0039.

Abstract: Sections 507(b), 508(a) and 516(b) of Public Law 95–87 require underground mine permit applicants to provide a description of each existing structure proposed to be used in the mining and reclamation operation and a compliance plan for structures proposed to be modified or constructed for use in the operation. This information is used by the regulatory authority in determining if the applicant can comply with the applicable performance and environmental standards.

Bureau Form Number: None.

Frequency: On occasion.

Description of Respondents: Underground Coal Mining Operators.

Estimated Completion Time: 24 hours.

Annual Responses: 3,017.

Annual Burden Hours: 71,760.

Bureau clearance officer: Richard L. Wolfe (202) 343–5143.

Dated: August 9, 1991.

John P. Mosesso,
Chief, Division of Technical Services.

[FR Doc. 91-22579 Filed 9-18-91; 8:45 am]
BILLING CODE 4310-05-M

INTERSTATE COMMERCE COMMISSION

[Docket No. AB-336; Sub-No. 2X]

Indiana Hi-Rail Corp.—Discontinuance Exemption—in Perry and Spencer Counties, IN

[Docket No. AB-290; Sub-No. 116X]

Norfolk Southern Railway Co.—Abandonment Exemption—in Perry and Spencer Counties, IN

AGENCY: Interstate Commerce Commission.

ACTION: Notice of exemption.

SUMMARY: The Commission exempts from the prior approval requirements of 49 U.S.C. 10903–10904, discontinuance of service by Indiana Hi Rail Corporation and an abandonment by Norfolk Southern Railway Company involving a 19.8-mile rail line in Perry and Spencer Counties, IN, between mileposts at Cannelton and near Santa Claus, subject to environmental and standard labor protective conditions.

DATES: Provided no formal expression of intent to file an offer of financial assistance has been received, this exemption will be effective on October 4, 1991. Formal expressions of intent to file an offer [1] of financial assistance under 49 CFR 1152.27(c)(2) must be filed by September 30, 1991, petitions to stay must be filed by September 24, 1991 and petitions for reconsideration must be filed by September 30, 1991. Requests for a public use condition must be filed by September 30, 1991.

ADDRESSES: Send pleadings referring to Docket Nos. AB-336 (Sub-No. 2X) and AB-290 (Sub-No. 116X) to:

(1) Office of the Secretary, Case Control Branch, Interstate Commerce Commission, Washington, DC 20423, and

(2) Petitioners' representatives: Keith G. O'Brien, Rea, Cross & Auchincloss, 1920 N Street, NW #420, Washington, DC 20036,

and

Robert J. Cooney, Norfolk Southern Corporation, Three Commercial Place, Norfolk, VA 23510–2191.

FOR FURTHER INFORMATION CONTACT: Joseph H. Dettmar (202) 275–7245. (TDD for hearing impaired (202) 275–1721).

SUPPLEMENTARY INFORMATION: Additional information is contained in the Commission's decision. To purchase a copy of the full decision, write to, call, or pick up in person from: Dynamic Concepts, Inc., room 2229, Interstate Commerce Commission Building, Washington, DC 20423. Telephone (202) 289–4357/4359. Assistance for the hearing impaired is available through TDD services (202) 275–1721.

Decided: September 12, 1991.

By the Commission, Chairman Philbin, Vice Chairman Emmett, Commissioners Simmons, Phillips, and McDonald.

Sidney L. Strickland, Jr.,
Secretary.

[FR Doc. 91-22599 Filed 9-18-91; 8:45 am]
BILLING CODE 7035-01-M

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[1] See Exempt. of Rail Abandonment—Offers of Finan. Assist., 4 I.C.C.2d 164 (1987).

DEPARTMENT OF JUSTICE

Allied Corp., et al.; Lodging of Consent Decree

In accordance with the policy of the Department of Justice, 28 CFR 50.7, and pursuant to section 122(d)(2) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. 9622(d)(2), notice is hereby given that the final proposed Consent Decree in *United States* v. *Allied Corporation, et al.*, C–83–5898 FMS and C–83–5896 FMS, was lodged with the United States District Court for the Northern District of California on September 3, 1991. These actions were brought by the United States Department of the Navy pursuant to section 107 of CERCLA, 42 U.S.C. 9607.

Under the proposed Consent Decree, the United States Department of the Navy agrees to pay $500,000 to the Atchison, Topeka and Santa Fe Railway Company ("ATSF") and related corporations to resolve ATSF's claims against the United States for environmental response actions taken and to be undertaken along a railroad right-of-way which transects the United States Naval Weapons Station, Concord, California ("NWS"). ATSF agrees to perform environmental response actions on the right-of-way.

The Department of Justice will receive comments relating to the proposed Consent Decrees for a period of 30 days from the date of this publication. Comments should be addressed to the Acting Assistant Attorney General of the Environment and Natural Resources Division, Department of Justice, 10th and Pennsylvania Ave., Washington, DC 20530. All comments should refer to *United States* v. *Allied Corporation, et al.*, D.J. Ref. 90–11–3–26.

The proposed Consent Decree may be examined at the office of the United States Attorney, 450 Golden Gate Ave., room 10605, San Francisco, California 94102. A copy of the proposed Consent Decree may also be examined at the Environmental Enforcement Section, Document Center, 601 Pennsylvania Avenue Building, NW., Washington, DC 20004 (202–347–2072).

A copy of the proposed Consent Decree may be obtained in person or by mail from the Environmental Enforcement Section Document Center, 601 Pennsylvania Avenue, NW., Box 1097, Washington, DC 20004. Any request for a copy of the proposed Consent Decree should be accompanied by a check in the amount or $7.75 for copying costs ($0.25 per page) payable to "Consent Decree Library".

Barry M. Hartman,

Acting Assistant Attorney General, Environment and Natural Resources Division.

[FR Doc. 91–22514 Filed 9–18–91; 8:45 am]

BILLING CODE 4410–01–M

Lenox, Inc., et al.; Lodging of Consent Decree

In accordance with Departmental policy, 28 CFR 50.7, notice is hereby given that on August 30, 1991, a proposed Consent Decree in *United States* v. *Lenox, Incorporated, et al.*, No. 90–CV–3866, was lodged with the United States District Court for the District of New Jersey. The complaint in this action, filed pursuant to the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. 9601 *et seq.*, seeks to compel the potentially responsible parties at the Site, Lenox, Incorporated ("Lenox") and Galloway Township (the "Township"), to perform the remedial activities selected by the Environmental Protection Agency ("EPA") in its Record of Decision dated September 27, 1990 and to recover costs incurred by EPA at the Mannheim Avenue Dump Superfund Site ("Site") located in Galloway Township, Atlantic County, New Jersey.

The proposed Consent Decree embodies an agreement by Lenox and the township to pay the United States $554,959.72 for past response costs incurred by EPA at the Site. It also requires Lenox and the Township to perform the remedial work selected by EPA in its Record of Decision dated September 27, 1990, *i.e.*, treatment of contaminated groundwater, and to pay for EPA's costs in overseeing this work.

The Department of Justice will receive comments relating to the proposed Consent Decree for a period of thirty (30) days from the date of this publication. Comments should be addressed to the Acting Assistant Attorney General for the Environment and Natural Resources Division, Department of Justice, Washington, DC 20530, and should refer to *United States* v. *Lenox, Incorporated, et al.*, DOJ No. 90–11–2–663.

The proposed Consent Decree may be examined at the Region II Office of the Environmental Protection Agency, 26 Federal Plaza, New York, New York 10278, and at the Environmental Enforcement Section Document Center, 601 Pennsylvania Avenue Building, NW., Washington, DC 20004 (202–347–2072).

A copy of the proposed Consent Decree may be obtained in person or by mail from the Environmental Enforcement Section Document Center, 601 Pennsylvania Avenue Building, NW., Box 1097, Washington, DC 20004. In requesting a copy, please refer to the referenced case and enclose a check in the amount of $10.75 (25 cents per page reproduction cost) for the Consent Decree.

Barry M. Hartman,

Acting Assistant Attorney General, Environment and Natural Resources Division.

[FR Doc. 91–22513 Filed 9–18–91; 8:45 am]

BILLING CODE 4410–01–M

Consent Judgment in Action to Enjoin Violations of the Clean Water Act

In accordance with Departmental Policy, 28 CFR 50.7, 38 FR 19029, notice is hereby given that Consent Decrees in *United States* v. *Louisiana-Pacific Corporation*, No. C–78–0567 MHP, and *Surfrider Foundation* v. *Louisiana-Pacific Corporation and Simpson Paper Company*, No. C–89–1738 MHP, were lodged with the United States District Court for the Northern District of California on September 9, 1991.

The Consent Decrees require payment of a $2.9 million penalty by each defendant for violations of the defendants' National Pollutant Discharge Elimination System (NPDES) permits, issued under sections 301(m) and 402 of the Clean Water Act, 33 U.S.C. 1311(m), 1342, and enjoin further violations of the Clean Water Act and the defendants' NPDES permits. The Consent Decrees provide that the defendants will commit to install in-plant process changes and/or treatment technologies necessary to achieve compliance with the Clean Water Act, defendants' NPDES permits, and the Consent Decrees.

The Department of Justice will receive for thirty (30) days from the date of publication of this notice written comments relating to the Consent Decrees. Comments should be addressed to the Assistant Attorney General, Environment and Natural Resources Division, Department of Justice, Washington, DC 20530 and should refer to *United States* v. *Louisiana-Pacific Corporation, DOJ Ref. No. 62–11–90A, and Surfrider Foundation* v. *Louisiana-Pacific Corporation and Simpson Paper Company*, DOJ Ref. No. 62–5–1–1–950A.

The Consent Degrees may be examined at the Office of the United States Attorney, Northern District of California, 450 Golden Gate Avenue, San Francisco, California, at the Region IX Office of the Environmental

Protection Agency, 75 Hawthorne Street, San Francisco, California, and at the Environmental Enforcement Section Document Center, 601 Pennsylvania Avenue NW., Box 1097, Washington, DC 20004, tel. (202) 347-2072. Copies of the Consent Decrees may be obtained in person or by mail from the Document Center. In requesting copies, please tender a check in the amount of $27.25 (25 cents per page reproduction charge) payable to the Consent Degree Library.

Barry M. Hartman,

Acting Assistant Attorney General, Environment and Natural Resources Division.

[FR Doc. 91-22515 Filed 9-18-91; 8:45 am]

BILLING CODE 4410-01-M

LIBRARY OF CONGRESS

Federal Library and Information Center Committee; Bylaws

AGENCY: Federal Library and Information Center Committee (FLICC), Library of Congress (LC).

ACTION: Notice.

SUMMARY: Notice is hereby given of the adoption of Bylaws for the Federal Library and Information Center Committee. These are intended to formalize practices and procedures that have evolved since the Committee's establishment in 1965, and the Bylaws will govern the members and regulate FLICC's affairs.

DATES: July 16, 1991.

ADDRESSES: Federal Library and Information Center Committee, Library of Congress, Washington, DC 20540.

FOR FURTHER INFORMATION CONTACT: Mary Berghaus Levering, Executive Director, Federal Library and Information Center Committee, Library of Congress, telephone (202) 707-4810, FAX (202) 707-4818.

SUPPLEMENTARY INFORMATION: The Federal Library and Information Center Committee (FLICC) was established in 1965 as the Federal Library Committee. The Congress of the United States approved the appropriation of funds for a secretariat's office at the Library of Congress. These Bylaws are established by, The Librarian of Congress, upon the recommendation of the members of FLICC, for the purpose of governing the organization and operation of FLICC as it functions under the authority of the Librarian of Congress and with the cooperation and concerted action of other Federal entities (2 U.S.C. 136).

Preamble

The Federal Library and Information Center Committee (FLICC) is an organization of federal agencies established originally as the Federal Library Committee by the Librarian of Congress, at the behest of federal librarians and the Office of Management and Budget (then the Bureau of the Budget). FLICC continues in recognition of the need for cooperation and concerted action within the community of federal libraries and information centers. FLICC's purpose is to achieve better utilization of federal library and information center resources and facilities through promotion of common services, coordination and sharing of available resources, and professional development. FLICC also serves as a forum for discussion of federal library and information policies, programs, and procedures to help inform the Congress, federal agencies, and others concerned with libraries and information centers about these issues. A major goal of FLICC is to provide the most cost-effective and efficient information services possible to parent agency staffs, other government agencies, and the nation at large.

Authority: These Bylaws are established by the members of FLICC with the concurrence and approval of the Librarian of Congress, for the purpose of governing the organization and operation of FLICC as it functions under the authority of the Librarian of Congress and with the cooperation and concerted action of other Federal entities.

Article I. Name

The name of this organization shall be the Federal Library and Information Center Committee (FLICC). An operating component of FLICC is the Federal Library and Information Network (FEDLINK).

Article II. Federal Library and Information Center Committee (FLICC)

Section 1. Committee

Only federal employees are eligible to serve on the committee. Representation is obtained: by designation of the Secretary of each department, or the head of each agency authorized permanent membership, to be their representative; through election by the voting members of FEDLINK (a total of 15 shall serve staggered terms of three years each with five elected each year); and through selection by the permanent members of FLICC (a total of 9 shall serve staggered terms of three years each with three selected each year). The Chairman of FLICC is the Librarian of Congress or the Librarian's designee.

Section 2. Permanent Membership

Permanent members of FLICC are:

A. Librarian of Congress

B. Director of the National Agricultural Library

C. Director of the National Library of Medicine

D. A representative from each of the cabinet level executive departments:

- Agriculture.
- Commerce.
- Defense.
- Education.
- Energy.
- Health and Human Services.
- Housing and Urban Development.
- Interior.
- Justice.
- Labor.
- State.
- Transportation.
- Treasury.
- Veterans Affairs.

E. A representative from each of the following agencies:

- Department of Army.
- Department of Navy.
- Department of Air Force.
- Administrative Offices of the U.S. Courts.
- Defense Technical Information Center.
- Executive Office of the President.
- Government Printing Office.
- National Aeronautics and Space Administration.
- National Archives and Records Administration.
- National Science Foundation.
- National Technical Information Service (Department of Commerce).
- Office of Scientific and Technical Information (Department of Energy).
- Smithsonian Institution.
- Supreme Court of the United States.
- U.S. Information Agency.

F. Chair of FEDLINK Advisory Council (FAC)

Section 3. Observers

One representative from each of the following agencies shall be invited as a nonvoting observer to committee meetings to advise on their agencies' policies and procedures:

A. General Accounting Office

B. General Services Administration

C. Joint Committee on Printing

D. National Commission on Libraries and Information Science

E. Office of Management and Budget

F. Office of Personnel Management

G. Library of Congress Financial Services Directorate

Section 4. Ex-Officio Member

The FLICC Executive Director shall serve as a nonvoting member of FLICC.

Section 5. Duties and Responsibilities

FLICC shall:

A. Coordinate cooperative activities and services among federal libraries and information centers.

B. Serve as a forum to consider and make recommendations through the Librarian of Congress concerning:

1. Issues and policies that affect federal libraries and information centers.

2. Needs and priorities in providing information services to the federal government and to the nation at large.

3. Efficient and cost-effective use of federal library and information resources and services.

C. Encourage and promote:

1. Improved access to information.

2. Continued development and use of the Federal Library and Information Network (FEDLINK).

3. Research and development in the application of new technologies to federal libraries and information centers.

4. Improvements in the management of federal libraries and information centers.

5. Relevant educational opportunities.

Section 6. Duties of the FLICC Executive Director

A. Manages all aspects of the work of the staff in carrying out the programs and activities assigned to it. Receives policy guidance and direction from the FLICC chair and advice from the FLICC Executive Board. Assumes a high level of initiative, imagination, and independent responsibility for this program of national significance.

B. Manages the operation of the Federal Library and Information Network (FEDLINK).

Article III. FLICC Membership Meetings and Voting

Section 1

Meetings of the membership shall be held quarterly and when called by the Chair. The FLICC office shall issue a notice at least thirty days in advance of the meeting.

Section 2

The spring meeting shall be the annual business meeting for the purpose of receiving reports, approving the budget, and such other business as may properly arise. The proposed budget shall be circulated by the FLICC Executive Board (FEB) (whose duties are described in Article IV) through the FLICC office to the membership at least thirty days in advance of the meeting. The fall meeting shall provide a forum for member concerns, including the annual budget, and shall provide for the transaction of such other business as may properly arise. This meeting shall be an open meeting.

Section 3. Voting

Each member shall be entitled to one vote. An alternate representative or proxy may be designated by the official representative, provided that such alternate is a federal employee and that the requirements of these Bylaws and the voting procedures approved by the FEB are met. Proxy designations shall be made in typed or written form, signed, or with a hard copy of an electronic mail transmission presented by the proxy designee at the time of the meeting.

Section 4. Vote by Mail

A vote by mail may be ordered by the FEB.

Section 5. Quorum

A quorum shall consist of the members present at any formally scheduled meeting, provided there are at least 10 official (non-proxy) members present.

Section 6.

The Vice-Chair of the FLICC FEB shall preside in the absence of the Chair.

Article IV. FLICC Executive Board (FEB)

Section 1. Board

The FEB shall consist of the Chair of FLICC and ten (10) additional members, all of whom are federal employees. The Chair of FLICC shall be the Chair of the FEB. Members of the FEB are designated as follows: Six (6) are appointed by the Chair upon nomination by FLICC from its own membership to serve 3 year terms (staggered); three (3) are appointed by the FEB Chair to serve a term of 3 years; and the Chair of the FEDLINK Advisory Council (FAC). FEB members may be reelected or reappointed to additional terms, limited to two consecutive terms.

Section 2. Ex-Officio Member

The FLICC Executive Director shall serve as a nonvoting member of the FEB.

Section 3. Duties and Responsibilities

The FLICC Executive Board (FEB) shall:

A. Formulate policies and present them to FLICC for review and approval.

B. Participate in FLICC membership meetings.

C. Establish FLICC Working Groups, as necessary.

D. Recommend and present to the FLICC membership for approval program objectives, plans, and annual budgets for accomplishment of these objectives. This may include, but not be limited to, submissions from Standing Working Groups.

E. Apprise the federal library community of issues related to FLICC programs, services, policies, or objectives; or of general interest to the community.

F. Provide advice, policy guidance, and oversight to the FLICC Executive Director regarding FLICC programs and budgeting.

G. Formulate policies for and, through the FAC, provide oversight to the operations of FEDLINK and approve new FEDLINK initiatives.

H. Settle disputes and interpret matters relating to FLICC membership, voting, etc.

Section 4. Meetings

The FEB shall hold meetings at least bi-monthly. A quorum of six (6) voting members shall be necessary to vote and conduct business, except those actions permitted by the adopted parliamentary authority.

Section 5. Removal

FEB members who miss a total of 5 FEB and/or FLICC membership meetings in a 12 month period may be replaced for a lack of participation by a majority vote of the FEB.

Section 6. Duties of the Chair

The Chair of the FEB shall preside at all FLICC membership and FEB meetings and is responsible for calling regular and special meetings of FLICC and the FEB for transaction of business in accordance with the Bylaws. The Chair shall appoint Working Group Chairs and members as required, except for the FEDLINK Advisory Council (FAC). The FEB Chair shall appoint a FEB member to act as either Chair or liaison to each Working Group. The Vice-Chair of the FEB shall act in the absence of the Chair.

Section 7. Vice-Chair

At the first meeting of each calendar year, the chair of the FEB shall appoint a Vice-Chair upon nomination by the Board. The Vice-Chair will serve a term of one year or until a successor is appointed and takes office. The Vice-Chair shall be eligible for reappointment, limited to two consecutive terms. Should the office of Vice-Chair become vacant, a new one shall be immediately appointed from the remaining FLICC FEB members.

Article V. FEB Working Groups

Section 1

The Working Groups shall be of two classes: Standing Working Groups and Ad Hoc Working Groups.

Section 2. Standing Working Groups

The following shall be Standing Working Groups:

- FEDLINK Advisory Council (FAC).
- Finance.
- Policy.
- Nominating.
- Membership and Governance.
- Education.

Standing Working Group Chairs and members shall be appointed as necessary by the FEB Chair, except for the FAC. Each Standing Working Group shall submit timely activity reports and an annual budget to the FEB.

Section 3. Ad Hoc Working Groups

Ad Hoc Working Groups shall be appointed as needed for a stated period to accomplish a specific purpose. Chairs and members shall be appointed by the FEB Chair. At the end of the stated period, the continuation of every Ad Hoc Working Group shall be decided by the FEB.

Section 4. FEB Liaison

The Chair of the FEB shall appoint a FEB member to act as either liaison or Chair from the FEB to each Standing and Ad Hoc Working Group except the FAC.

Section 5. Ex-Officio Member

The FLICC Executive Director shall be a nonvoting, ex-officio member of the Standing Working Groups.

Section 6. Membership

Members of Working Groups need not be limited to members of the FEB nor to the FLICC membership. Specialists from outside of the FLICC may be appointed to Working Groups except the FAC.

Section 7. Working Group Size

Except for the FAC, the size of the Working Groups shall be determined by the FEB.

Article VI. Federal Library and Information Network (FEDLINK)

Section 1. Objective

FEDLINK is a network of cooperating federal libraries and information centers established by FLICC in accordance with these Bylaws to:

A. Obtain services, products, and systems to achieve more efficient and cost-effective utilization of Federal library and information resources.

B. Provide for formal relationships between FEDLINK members and networks and bibliographic utilities.

C. Represent the interests and concerns of member libraries and information centers.

D. Provide training and demonstrations in network services and new library and information technology for the benefit of federal libraries and information centers.

E. Engage in other related matters serving the member libraries and information centers.

Article VII. FEDLINK Membership

Section 1

The membership of FEDLINK shall consist of members and participants.

Section 2. Eligibility for Membership

A. A member shall meet the following requirements:

1. Be a federal library or federal information center.

2. Obligate funds for at least one FEDLINK service to FLICC for management, or to vendors for services managed by FLICC with payment of any required administrative fees to FLICC, including

a. Payment of any required entrance fee at the current rate;

b. Continuing independent transfer of administrative and operating funds;

3. Be independent, in terms of accepted agency coordinating function, i.e., federal government library programs at the bureau or lower levels which are not coordinated by the departmental library/administrative office.

B. A participant shall be any other federal user of FEDLINK services not eligible to be a member.

C. Rules on eligibility for FEDLINK membership

1. Candidates for membership and participant status shall be considered federal if:

a. They receive 80 percent or more of their direct funding from the U.S. government,

b. Or are otherwise agencies eligible by statute,

c. Or are agencies that may be determined eligible by the Library of Congress general counsel. Entities such as government-owned contractor-operated facilities shall be represented by a federal employee.

2. The issue of agency management of dispersed library/information centers is an internal one. However, the following are possible guidelines for the FEDLINK Advisory Council (FAC) in case of discrepancy or conflict.

a. Established precedent, i.e., a person/position that has traditionally exercised leadership and coordinating functions in managing the agency library/information centers. For example, the centers relate to each other in a way having some characteristics of a network, even if these are not line relationships.

b. A "headquarters" center versus field location. In case of doubt, the FAC shall consult the recognized library/information coordinator or highest-ranking such person in the agency. Any individual(s) disagreeing with the FAC decision may appeal within the agency, and the agency's decision will be accepted. Users of FEDLINK services in agencies which meet the criteria for one member shall be represented by that member.

Section 3. Rights and Responsibilities of Membership

A. Participants shall have all the rights and responsibilities of members, except the right to vote.

B. Members and participants shall:

1. Be responsible for specifying in writing, responsible contact person(s) for various committees and functions;

2. Receive one mailing and shall be responsible for determining further distribution to all its locations;

3. Be responsible for payment of fees;

4. Be responsible for proper use of systems and services.

Section 4. Interpretation

All cases of discrepancy, conflict, or interpretation related to membership status, rights, or responsibilities shall be referred to the FEDLINK Advisory Council (FAC) for decision.

Article VIII. FEDLINK Advisory Council (FAC)

Section 1. Council

The FAC shall consist of nine members. The FAC Chair shall be elected from the FAC itself. The FAC Chair's term shall be for one year, with options for reelection. All members of the FAC shall be selected as follows: the three (3) FLICC members, of the five elected each year by the voting members of FEDLINK, who received the highest number of votes shall automatically serve also as members of the FAC. All FAC members must come from FEDLINK member institutions. FAC members shall serve (staggered) terms of three (3) years each with three new members taking office each year.

Section 2. Ex-Officio Members

The FLICC Executive Director and the FEDLINK Coordinator shall serve as nonvoting members of the FAC.

Section 3. Duties and Responsibilities

The FEDLINK Advisory Council (FAC) shall:

A. Provide advice, oversight, and assistance to the FLICC Executive Director concerning FEDLINK operations and services, in accordance with established FLICC policies, as approved by the FEB.

B. Apprise the membership of issues related to FEDLINK services, policies, or objectives, or which are of general interest to the membership.

C. Provide oversight, direction and assistance to FEDLINK OCLC Users Council Delegates concerning voting, issues, and like matters.

D. Submit to the FLICC FEB for approval initiatives for new FEDLINK services; program objectives and plans; and the projected annual FEDLINK operating budget.

E. Within the authority granted by the FLICC FEB, ask the FLICC Executive Director to initiate appropriate agreements for FEDLINK with various services, systems, groups, and agencies.

F. Settle disputes and interpret matters relating to FEDLINK membership, voting, and like matters.

G. Establish and instruct committees of the FAC.

Section 4. Meetings

The FAC shall hold meetings at least bi-monthly. A quorum of five (5) voting members shall be necessary to vote and conduct business, except those actions permitted by the adopted parliamentary authority.

Section 5. Removal

FAC members who miss a total of 4 FAC meetings in a 12 month period may be replaced for lack of participation by a majority vote of the Council. The FLICC member with the fourth highest number of votes, of the year group in question that was elected by the FEDLINK membership, will replace the removed member, and so on.

Article IX. FAC Officers

Section 1. Elections

At the first meeting of each calendar year, the FAC shall elect from among its members a Chair, Vice-Chair, and a Secretary. These officers shall take office at the close of the meeting at which they are elected and shall serve terms of one year or until their successors are elected and take office. Officers shall be eligible for reelection, limited to two consecutive terms. Should the office of the Chair become vacant, the Vice-Chair shall assume the office for the remainder of the term. Other offices may be filled for the balance of the term by FAC election. (See Article VIII, Section 5 for procedure for replacing lost members.)

Section 2. Duties

A. Chair. The Chair of the FAC shall preside at all FAC meetings and shall be responsible for calling regular and special meetings of the FAC for transaction of business in accordance with the Bylaws.

B. Vice-Chair. The Vice-Chair of the FAC shall preside in the absence of the Chair.

C. Secretary. The Secretary of the FAC shall record the minutes of the proceedings of all meetings, and provide a copy of the minutes signed by the Chair to each FAC member and to the FLICC Executive Director for further distribution, as needed.

Article X. FEDLINK Delegation to OCLC Users Council

Section 1

The FEDLINK Voting Members who use OCLC services shall elect a delegation of representatives to the OCLC Users Council. The delegates shall be from among FEDLINK members who are users of OCLC and as many in number as shall be required and authorized by OCLC. Delegates shall, to the extent possible, be representative of the FEDLINK membership.

Section 2

FEDLINK Members who participate in OCLC shall be general members of OCLC and shall be represented in the governance of OCLC by the FEDLINK delegates to the OCLC Users Council.

Section 3. Powers and Duties

FEDLINK delegates shall have the following powers and duties:

A. Annually elect from among the FEDLINK delegates a Chair who shall serve no more than three consecutive one-year terms. The elected Chair shall call and preside over delegation caucuses and shall be responsible for reporting User Council issues and actions/recommendations to the FAC and, if so directed by the FAC, to the FEDLINK membership.

B. Attend, as requested, FAC meetings to discuss Council matters.

C. Adhere to voting guidelines so directed by the FAC.

D. Attend meetings of, and present to, the OCLC Users Council issues and recommendations, as directed by the FAC.

Section 4. Elections

The delegates shall be qualified and selected in accordance with the Code of Regulations of OCLC, Article V. Should a vacancy occur, elected alternates shall succeed as delegates.

Section 5. Term

Delegates shall be elected for staggered three year terms. Each delegate shall hold office until his/her successor has been elected and commenced his/her term. Delegates may be reelected.

Article XI. Parliamentary Authority

The rules contained in the current edition of "Roberts Rules of Order Newly Revised" shall be used as a guide in all cases to which they are applicable and in which they are not inconsistent with these Bylaws or any special rules applicable to FLICC. The Chair shall control and conduct meetings in an orderly fashion. The Chair should use such parliamentary guide ("Robert's Rules of Order Newly Revised") to support his/her decisions; but such parliamentary guide shall not overrule the Chair's decisions.

Article XII. Amendment of the Bylaws

These Bylaws may be amended at any FLICC meeting by a two-thirds vote of the members voting, provided that previous notice of the proposed amendments has been given in accordance with these Bylaws; and that the Librarian of Congress concurs. Proposed amendments to the Bylaws shall be submitted to the Chair of FLICC at least six weeks in advance, and, upon direction of the FEB, circulated to the FLICC membership by the FLICC office at least thirty days in advance of the meeting at which they are to be considered.

FLICC Members at FLICC Quarterly Membership Meeting, December 13, 1990.

Dated: May 8, 1991

Donald C. Curran,

Associate Librarian for Constituent Services, Library of Congress. Chair Designate, Federal Library and Information Center Committee

Dated: May 10, 1991.

John Kominski,

General Counsel, Library of Congress.

Dated: July 16, 1991.

James H. Billington,

The Librarian of Congress, Chair, Federal Library and Information Center Committee

[FR Doc. 91–22511 Filed 9–18–91; 8:45 am]

BILLING CODE 1410-01-M

NATIONAL ARCHIVES AND RECORDS ADMINISTRATION

Advisory Committee on the Records of Congress; Meeting

AGENCY: National Archives and Records Administration.

ACTION: Notice of meeting.

SUMMARY: In accordance with the Federal Advisory Committee Act, the National Archives and Records Administration (NARA) announces the first meeting of the Advisory Committee on the Records of Congress. The committee advises NARA on the full range of programs, policies, and plans for the Center for Legislative Archives in the Office of the National Archives.

DATES: October 3, 1991, from 9 a.m. to noon.

ADDRESSES: United States Capitol Building, Lyndon Johnson Room (Room S211)—9 a.m. to 10 a.m.

National Archives Building, room 410, 7th and Pennsylvania Avenue, NW., Washington, DC—11 a.m. to noon.

FOR FURTHER INFORMATION CONTACT: Trudy H. Peterson, Assistant Archivist for the National Archives, (202) 501–5300.

SUPPLEMENTARY INFORMATION: The agenda for the meeting includes a tour of the Center for Legislative Archives, discussion of the Five-Year Plan and preservation program of the Center, and a planned report on the impact on legislative records of the 1994 move to the new NARA facility in College Park, MD.

The meeting is open to the public. Seating capacity for the session at the National Archives Building is limited to 38 persons.

Dated: September 16, 1991.

Don W. Wilson,

Archivist of the United States.

[FR Doc. 91–22689 Filed 9–18–91; 8:45 am]

BILLING CODE 7515–01–M

NATIONAL SCIENCE FOUNDATION

Program Announcement and Guidelines; Presidential Faculty Fellows Program for the Most Outstanding Young Science and Engineering Faculty

Closing Date: December 2, 1991.

This printed information contains the essence of the announcement for this program, and is not a full copy of the actual brochure containing the guidelines for submission. Before submitting a nomination, please obtain a printed copy of the guidelines by writing or calling the publications office of NSF.

At the request of the President of the United States, the National Science Foundation announces a new Presidential Faculty Fellows Program (PFF) whereby the President will recognize and support the scholarly activities of some of the Nation's most outstanding young science and engineering faculty members. The National Science Foundation seeks nominations of tenure-track faculty members who have demonstrated an exceptionally high level of research and teaching competence and who have the highest potential for leadership in academic pursuits. Awards are intended to allow Fellows to undertake self-designed, innovative research and teaching projects, to establish research and teaching programs, and to pursue other activities appropriate for outstanding young faculty.

Awards will be announced in Spring 1992, and will carry a grant from the National Science Foundation of $100,000 per year for five years, subject to the availability of funds. Thirty (30) PFF awards are planned of which fifteen (15) will be in engineering and fifteen (15) in science.

The Foundation is also inaugurating this year the National Science Foundation Young Investigator Program (NYI). Together, these two activities replace the Presidential Young Investigator Program which operated from 1984 through 1991. The two activities will operate independently. The NYI program will have a submission deadline separate from the PFF award. A separate listing regarding the NYI program will appear in the **Federal Register**. Separate nominations are required for the PFF and NYI Programs. PFF awards will be made first, and successful nominees who have also been nominated for the NYI competition will have their nominations administratively withdrawn from the latter. Similarly, successful PFF nominees who have been nominated for the Faculty Awards for Women (FAW) Competition will have their nominations administratively withdrawn from the FAW competition.

Current or former Presidential Young Investigators, who meet all the stated eligibility criteria, are eligible for PFF awards. In successful cases, such PYI awardees will have their PYI awards terminated if active, and their PFF awards will be limited in duration to the number of years unused on their PYI awards. In no case, however, will the tenure of a PFF award be less than two years. Current FAW awardees who receive PFF awards will have their FAW awards terminated, but will be eligible for the full five years of their PFF awards.

Institutional Eligibility

All institutions in the United States that offer a baccalaureate, master's or doctoral degree in a field supported by the Foundation are eligible to participate in this program.

Limit on Nominations

Two nominations may be made by each eligible institution per year.

Faculty Eligibility

To be eligible nominees must:

- Be U.S. citizens or permanent residents as of December 2, 1991;
- Hold a Ph.D. degree, or equivalent, awarded between January 1, 1984 and December 2, 1991; and
- Have begun their first tenure-track or equivalent position at any four-year or graduate-level college or university after December 1, 1988.

Discipline Eligibility

Nominees may work in any discipline of science or engineering normally supported by the Foundation, including research in engineering education or science education.

The Foundation normally will not support biomedical research with disease-related goals, including work on the etiology, diagnosis, or treatment of physical or mental disease, abnormality, or malfunction in human beings or animals. Animal models of such conditions, or development or testing of drugs or other procedures for their treatment also generally are not eligible for support.

Review and Selection

Presidential Faculty Fellows will be selected on the basis of ability, including leadership and leadership potential in research and teaching. NSF will administer the review process and fund awards; the final award decisions will be made by the White House. Recommendations for awards will be based on advice from outstanding scientists and engineers and may include consideration of factors related to science and engineering infrastructure.

The review criteria for the nominee include:

Research and Competence and Leadership in science or engineering, including the potential for continuing outstanding contributions, as evidenced by definitive research accomplishments, refereed publications, technical books published, patent and software credits,

significant technical papers presented at national or international meetings, honors, distinguished service, recognition by the community for contributions to the public understanding of research by lay-persons, and other noteworthy research contributions.

Teaching Competence and Leadership in science or engineering, including the potential for continuing outstanding contributions, as evidenced by implementation of new curricula, design of new courses, significant educational books, refereed publications, papers presented at national or international meetings, honors, distinguished service, recognition by the community for contributions to public understanding of science or engineering, and other noteworthy education contributions.

Impact of Nominee on Nominating Institution as evidenced by factors such as significant facilitation of cross-discipline research efforts, recognized contributions to educational reforms, and other noteworthy service to the institution and in the community on behalf of the institution.

Nominating Official

Nominations for PFF awards must be submitted by the President or the Chief Academic Officer of the nominating institution.

Nominating Procedure

A PFF submission consists of six complete sets of the nomination materials, one set of an additional forms package to be used for administrative purposes, and four reference letters; each letter must be in an envelope that has been sealed by the individual referee. Each set of the nominating materials should be stapled, and the additional forms package should be clipped together but NOT stapled. Type styles should be no smaller than 12 characters per inch. Page limits must be strictly observed. No appendices or other attachments will be accepted in a PFF submission.

The nominating materials package contains the following:

• Cover Sheet (NSF Form 1273B (8–91));

• Nominator's Statement—A letter to the Director of the National Science Foundation setting forth the basis for the nomination. The letter should address the three principal review criteria described above. (Limit: 3 pages);

• Nominee's Teaching and Research Qualifications (Limit: 1 page);

• Nominee's Research Description (Limit: 2 pages);

• Nominee's Teaching Plan (Limit: 1 page); and

• Biographical Sketch—A brief sketch showing the nominee's name and current position; educational background including dates, institutions, and fields of earned degrees; and professional accomplishments, including professional employment history in reverse chronological order, honors, awards, and references to all publications during the past three years. Citations to representative earlier publications may be included when pertinent to the nomination. (Limit: 3 pages).

The additional forms package contains the following:

1 additional copy of the Cover Sheet (NSF Form 1273B (8–91));

2 copies of Supplementary Nominee Information (NSF Form 1225A); and

2 copies of the Office of Science and Technology Policy Information Form (NSF Form 1317 (8–91)).

The nomination cover sheet, NSF Form 1225A, and the Office of Science and Technology Policy Information Form are contained in the PFF Program Announcement.

Reference Letters

Four (4) reference letters are required. Letters should be from persons who are familiar with the research and teaching capabilities of the nominee, and may not be from individuals at the nominating institution. They should be in the form of letters to the Director of the National Science Foundation addressed and sent in referee-sealed envelopes to the NSF Director, Care of the Nominator, for inclusion in the nomination submission. Letters should specifically address at least one of the review criteria.

The nominating materials package, the additional forms package, and the reference letters should be submitted as a single unit in a large envelope addressed to: Presidential Faculty Fellows Program/NSF 91–103, National Science Foundation, 1800 G Street, NW., Washington, DC 20550.

Deadline for Submission of Nominations

All nomination submissions must be received at NSF by 5:00 p.m., December 2, 1991.

Support and Commitments

Except as otherwise provided in this announcement and other PFF program materials, the terms and conditions of this award are those stated in the publication, NSF 90–77—Grants for Research and Education in Science and Engineering. Awardees may expect to receive additional guidance regarding the administration of their grants.

Institutions are expected to make a significant contribution to the support of awardees by guaranteeing their full academic-year salary. None of the funds provided by NSF under PFF awards may be used for the academic-year salary of the awardee. Indirect costs are limited to 10% of the funds provided by NSF.

The 1992 Presidential Faculty Fellows will be announced in Spring 1992. They are expected to begin their activities under this program no later than October 1, 1992. PFF awardees must remain in tenure-track positions at eligible institutions at all times during the tenure of their awards.

Inquiries

Inquiries regarding this program may be addressed to the Presidential Faculty Fellows Program, National Science Foundation, Washington, DC 20550, or telephoned to (202) 357–7536. Descriptions and telephone numbers for NSF's programs can be found in the annual Guide to Programs, single copies of which can be obtained from Forms and Publications, National Science Foundation, Washington, DC 20550, telephone number (202) 357–7861. Users of electronic mail who have access to either BITNET or INTERNET may prefer to order publications electronically. BITNET users should address requests to pubs@nsf. INTERNET users should send requests to pubs@nsf.gov. In your request, include the NSF publication number and title, number of copies, your name, and a complete mailing address. The PFF Announcement is NSF 91–103.

Dated: September 16, 1991.

Mary Frances Sladek,

Program Manager, PFF/NYI Programs.

[FR Doc. 91–22601 Filed 9–18–91; 8:45 am]

BILLING CODE 7555-01-M

Young Investigators Awards Program; National Science Foundation Replaces Presidential Young Investigator Awards (PYI) Program With the National Science Foundation Young Investigator Awards Program

National Science Foundation; Young Investigator Awards; FY 1992 Program Announcement and Guidelines; Deadline January 31, 1992

This printed information contains the essence of the announcement for this program, and is not a full copy of the actual brochure containing the guidelines and nomination forms. Before submitting a nomination, please obtain a copy of the guidelines by writing or calling the publications office of NSF.

The National Science Foundation announces the NSF Young Investigator Awards (NYI) program, NSF 91–112. The Foundation is also inaugurating this year, at the request of the President of the United States, the Presidential Faculty Fellows Program (PFF), NSF 91–103. Together, these two activities replace the Presidential Young Investigator Program that operated from 1984 to 1991. The two activities will operate independently with separate nominations required. PFF awards will be announced first, and successful nominees who have also been nominated for the NYI competition will have their nominations administratively withdrawn from the latter. The PFF program has different nominating and eligibility rules from both the PYI and NYI programs and is described under separate guidelines available upon request from the address noted at the end of this announcement.

The NYI Awards are established to achieve the following objectives:

• To recognize outstanding young faculty in science and engineering;

• To enhance the academic careers of recent Ph.D. recipients by providing flexible support for research and teaching;

• To foster contact and cooperation between academia and industry.

Approximately 150 new NYI awards will be made in this competition. Awards will be made for up to five years based on an annual determination of satisfactory performance and subject to the availability of funds.

The NYI awards are intended to encourage the development of future academic leaders, both in teaching and research. NSF Young Investigators are expected to have standard teaching responsibilities relative to non-NYI faculty.

Each NSF Young Investigator Award consists of an annual base grant of $25,000 from NSF plus up to $37,500 of additional funds per year on a dollar-for-dollar matching basis from industrial and not-for-profit sources [1], resulting in total annual support of up to $100,000.

Eligibility

NYI awards are tenable only in tenure-track or tenured positions at eligible institutions as defined by the institutional criteria listed below. NSF Young Investigators who transfer at any time prior to or during the period of their grants to institutions that do not meet the institutional eligibility criterion must resign their awards.

The following institutional, nominee, and discipline criteria apply to this program:

Institutional Criteria

• Any U.S. institution that awards a baccalaureate, master's or doctoral degree in a field supported by the Foundation is eligible to nominate faculty or prospective faculty to participate in this program.

Nominee Criteria

• Nominees must be U.S. citizens or permanent residents as of January 31, 1992;

• Nominees must have a Ph.D. degree, or equivalent, awarded or to be awarded on or after January 31, 1986, but no later than October 1, 1992;

• Nominees must not have entered on a tenure-track position at *any* college or university prior to January 1, 1988;

• Nominees must have a tenure-track or tenured faculty position or equivalent at their nominating institution or receive an appointment to such a position to begin on or before October 1, 1992; and

Discipline Criteria

• Any branch of science or engineering normally supported by NSF is eligible for support by the NYI Awards program, including research in engineering education or science education.

• NSF normally will not support biomedical research with disease-related goals, including work on the etiology, diagnosis, or treatment of physical or mental disease, abnormality, or malfunction in human beings or animals. Animal models of such conditions, or the development or testing of drugs or other procedures for their treatment also generally are not eligible for support.

Review and Selection

The review of nominees will be based on the nominee's ability and potential, as a researcher and teacher, for contributing to the vitality of the Nation's scientific and engineering effort. The selection of individuals to receive awards will be made by the National Science Foundation with the advice of panels of scientists and engineers and may include consideration of factors related to science and engineering infrastructure. The review criteria include:

• Nominee's competence in science or engineering—as evidenced by the nominee's most outstanding achievements to date, particularly the quality of research and publications, teaching acomplishments, institutional impact, and Reference Forms.

• Nominee's potential for continued professional growth as a research scientist or engineer—as evidenced by the quality of the nominee's research plan, the currency and significance of the long-range research, and the appropriateness of the research plan to his/her academic setting and its probable impact upon the institution's research environment.

• Nominee's potential for significant development as a teacher and academic leader in the training of future scientists or engineers and commitment to an academic career—as evidenced by the nominee's teaching plan and the narrative statements describing the nominee's qualifications for this award with regard to the nominee's development as an academic leader and the nominee's potential impact on the institution in its teaching mission.

The FY 1992 NYI awardees will be announced approximately June 1992. The base funding of $25,000 for the first year will be made at the time of the awards announcement. Awardees will be expected to begin their research activities under this program no later than October 1, 1992.

Nominating Procedures

Only the department chairperson or an analogous administrative official at the institution may nominate faculty members for the awards.

An NYI Submission consists of eight complete sets of the nomination form, additional forms as specified, and three Reference Forms in referee-sealed envelopes. Please staple each complete set of the nomination form separately. Type styles should be no smaller than 12 characters per inch. Forms for *all* pages of the submission are included in the actual program brochure.

Nomination Form

1. Cover Sheet (1 page).
2. Support and Commitment Statement (1 page).
3. Nominator's Narrative Statement (1 page).
4. Nominee's Research and Teaching Qualifications (1 page).
5. Nominee's Teaching Plan (1 page).
6. Nominee's Research Plan (2 pages).
7. Biographical Sketch (3 pages).

[1] NSF would like to encourage cooperation between university and industry on research activities and, therefore, encourages matching fund support from industry. Support from non-profit foundations and certain state and municipal agencies that promote science and technology or that delivery science or engineering related services, (e.g. wastewater treatment; transportation; or building regulation) are also acceptable for matching fund purposes. Matching Fund Guidelines will be provided to awardees.

Additional Forms

1. NSF Form 1225A—Supplementary Nominee Information (1 page).
2. Extra copy of the Cover Sheet.

References

Three completed reference forms in sealed envelopes should be provided from individuals who are familiar with the research and teaching capabilities of the nominee. Referees may not be from the nominating institution (comments from on-campus individuals may be incorporated in the Nominator's Narrative Statement.) Reference forms should be collected using NSF-provided, referee-sealed envelopes and sent in the nomination submission to NSF.

If NSF-provided envelopes are not available, envelopes should be addressed to The NSF Young Investigator Awards Program, Care of the Nominator and clearly marked on both sides: "To be opened only by NSF."

Support and Commitments

An NYI award carries a base NSF grant of $25,000 per year plus up to $37,500 of additional funds per year on a dollar-for-dollar basis to match contributions from industrial sources. The base grant of $25,000 for the first year will be provided at the time of the initial award. The first submission for matching funds should be accompanied by a total first-year budget, in support of the awardee's research activities. The budget should show both the amount requested from the Foundation (including the previously-granted base grant) and the sources and the amounts of industrial support. In subsequent years requests for funding of the base and any matching support should be combined in a single request. Further guidance for budget submissions will be provided to awardees.

Institutions are expected to contribute to the support of the awardees by guaranteeing their full academic year salary, assisting in the arrangement of outside matching funds, and providing them with the same financial assistance for the use of equipment and the costs of student help as is made available to other faculty. None of the funds, whether provided by this grant or by outside supporters of the program as matching funds may be used for the academic-year salary of the awardee; summer salary for awardees may be supported for up to two-ninths of the regular academic-year salary. Indirect costs are limited to ten percent of the total funds provided by the Foundation.

Except as otherwise provided in this announcement, the terms and conditions will be analogous to those stated in the publication, NSF 90–77—Grants for Research and Education in Science and Engineering.

Inquiries

Inquiries regarding the program may be addressed to the NSF Young Investigator Awards, National Science Foundation, 1800 G Street, NW., Washington, DC 20550, or telephoned to (202) 357–7536. Inquires regarding a nomination's review should be addressed to the appropriate NSF disciplinary division. Guidelines for the new program of Presidential Faculty Fellows can be obtained from the address given below. Descriptions and telephone numbers for NSF's programs can be found in the annual NSF Guide to Programs, single copies of which can be obtained by writing or telephoning Forms and Publications, National Science Foundation, Washington, DC 20550, (202) 357–7861. If you are a user of electronic mail and have access to either BITNET or INTERNET, you may prefer to order publications electronically. BITNET users should address requests to *pubs@nsf*. INTERNET users should send requests to *pubs@nsf.gov*. In your request, include the NSF publication number and title, number of copies, your name, and a complete mailing address. Publications will be mailed within 2 days of receipt of your request. The NYI Announcement is NSF 91–112.

Dated: September 16, 1991.

Mary F. Sladek,

Program Manager, PFF/NYI Programs.

[FR Doc. 91–22600 Filed 9–18–91; 8:45 am]

BILLING CODE 7555-01-M

Advisory Panel for Informal Science Education; Meetings

The National Science Foundation announces the following meetings:

Name: Advisory Panel for Informal Science Education.

Dates and Times: October 9, 1991, from 1 p.m. to 5 p.m. and October 10 and 11, from 8:30 a.m. to 5 p.m.

Place: The River Inn, 924 25th Street, NW., Washington, DC 20037.

Type of Meeting: Closed.

Contact Person: Robert L. Russell, Program Director, Informal Science Education Program, 1800 G Street, NW., room 630, Washington, DC 20550, Phone: (202) 357–7076.

Purpose of Meeting: To provide advice and recommendations concerning support for science education projects.

Agenda: To review and evaluate research proposals as part of the selection process for awards.

Reason for Closing: The proposals being reviewed include information of a proprietary or confidential nature, including technical information; financial data, such as salaries, and personal information concerning individuals associated with the proposals. These matters are within exemptions (4) and (6) of 5 U.S.C. 552b(c), Government in the Sunshine Act.

Dated: September 16, 1991.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 91–22602 Filed 9–18–91; 8:45 am]

BILLING CODE 7555-01-M

Material Research Advisory Committee; Meeting

The National Science Foundation announces the following meeting:

Name: Materials Research Advisory Committee (MRAC).

Place: Rooms 1242–1243, National Science Foundation, 1800 G Street, NW., Washington, DC 20550.

Date: Monday, October 7 and Tuesday, October 8, 1991.

Time: 8:30 a.m.–5:00 p.m. (Monday); 9:00 a.m.–5:00 p.m. (Tuesday).

Type of Meeting: Open.

Contact Person: Dr. J. Narayan, Division Director, Division of Materials Research (DMR); Room 408, National Science Foundation, Washington, DC 20550, Telephone: (202) 357–9794, FAX: (202) 357–7959.

Minutes: May be obtained from the contact person, Dr. J. Narayan, at the above stated address.

Purpose of Committee: To provide advice and recommendations concerning support of materials research.

Agenda

Monday, October 7, 1991

8:30 a.m. Introductory Remarks and Adoption of Minutes
9:00 a.m. DMR Status Reports and Budget Briefing
12:00 Noon Working Lunch
1:00 p.m. Meeting with Dr. Joseph Bordogna, Assistant Director, Engineering
2:00 p.m. Meeting with Dr. David Sanchez, Assistant Director Mathematical and Physical Sciences
3:30 p.m. Discussion of University-Industry-National Laboratory Linkages and International Collaborations
5:00 p.m. Adjourn

Tuesday, October 8, 1991

9:00 a.m. Discussion of Future Initiatives of Importance to DMR
10:00 a.m. Further Discussion of Future DMR Initiatives
11:30 a.m. Meeting with Dr. Walter Massey, Director
12:30 p.m. Working Lunch
1:30 p.m. Further Discussion and Future MRAC Activities
5:00 p.m. Adjourn

Dated: September 16, 1991.

M. Rebecca Winkler,

Committee Management Officer.

[FR Doc. 91–22603 Filed 9–18–91; 8:45 am]

BILLING CODE 7555–01–M

NUCLEAR REGULATORY COMMISSION

Proposed Requirements for Environmental Review for Renewal of Operating License

AGENCY: Nuclear Regulatory Commission.

ACTION: Notice of availability.

SUMMARY: The Nuclear Regulatory Commission (NRC) is proposing to amend its regulations (10 CFR part 51) to establish new requirements for environmental review of applications for renewal of nuclear power plant operating licenses. The proposed amendments would define the number and scope of environmental issues which would need to be addressed as part of a license renewal application. Concurrent with the proposed amendments, the NRC is publishing for comment a draft Generic Environmental Impact Statement, a draft Regulatory Guide, a draft Environmental Standard Review Plan, and a draft Regulatory Analysis which supplement the proposed amendments.

(1) NUREG–1437, "Generic Environmental Impact Statement for License Renewal of Nuclear Power Plants," Draft Report for Comment, Vol. 1 Main Report, Vol. 2 Appendices, USNRC, August 1991.

(2) NUREG–1440, "Regulatory Analysis for Proposed Amendments to Regulations for the Environmental Review for Renewal of Nuclear Power Plant Operating Licenses: Draft for Comment," USNRC, August 1991.

(3) DG–4002, "Guidance for the Preparation of Supplemental Environmental Reports in Support of an Application to Renew a Nuclear Power Plant Operating License: Draft for Comment," NUREG–0099, Regulatory Guide 4.2, Revision 2, Supplement No. 1, USNRC, August 1991.

(4) NUREG–1429, "Environmental Standard Review Plan for the Review of License Renewal Applications for Nuclear Power Plants," Draft Report for Comment, USNRC, August 1991.

ADDRESSES: A free single copy of NUREGs 1437, 1440, 1429, and DG–4002 to the extent of supply, may be requested by those considering providing comment by writing to the U.S. Nuclear Regulatory Commission, ATTN: Distribution and Mail Services Section, Washington, DC 20555. Copies of all documents cited are available for inspection, and/or for copying for a fee, in the NRC Public Document Room, 2120 L Street, NW (Lower Level.), Washington, DC. In addition, copies of the NUREGs may be purchased from the Superintendent of Documents, U.S. Government Printing Office, P.O. Box 37082, Washington, DC 20013–7082. Copies are also available for purchase from the National Technical Information Service, 5285 Port Royal Road, Sringfield, VA 22161.

FOR FURTHER INFORMATION CONTACT: Donald Cleary, Office of Nuclear Regulatory Research, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Telephone: (301) 492–3936.

Dated at Washington, DC, this 19th day of August, 1991.

For the Nuclear Regulatory Commission.

Warren Minners,

Director, Division of Safety Issue Resolution, Office of Nuclear Regulatory Research.

[FR Doc. 91–22629 Filed 9–18–91; 8:45 am]

BILLING CODE 7590–01–M

[Docket Nos. 50–348 and 50–364]

Alabama Power Co.; Consideration of Issuance of Amendments to Facility Operating Licenses, Proposed No Significant Hazards Consideration Determination and Opportunity for Hearing

The U.S. Nuclear Regulatory Commission (the Commission) is considering issuance of amendments to Facility Operating License Nos. NPF–2 and NPF–8 issued to Alabama Power Company (the licensee) for operation of Joseph M. Farley Nuclear Plant (FNP), located in Houston Country, Alabama.

By letter dated May 6, 1991, Alabama Power Company proposed amendments that would authorize Southern Nuclear Operating Company, Inc. (Southern Nuclear), to become the operator of FNP. Southern Nuclear would be the exclusive operating licensee, to possess, manage, use, operate, and maintain FNP. Alabama Power Company would continue to be the owner of the facility. Southern Nuclear would have no entitlement to power output from FNP or authority to dispatch, broker, or market the energy generated.

As described in the application, Alabama Power Company and Southern Nuclear are wholly owned subsidiaries of the Southern Company. Southern Nuclear was formed in December 1990 for the purpose of consolidating, into a single organization, personnel within the Southern Electric System engaged in nuclear operations. Alabama Power Company states that there would be no significant change in nuclear power or support organizations for FNP. The onsite nuclear generation organization currently responsible for the physical operation of FNP would be transferred intact to Southern Nuclear.

Before issuance of the proposed license amendments, the Commission will have made the findings required by the Atomic Energy Act of 1954, as amended (the Act), and the Commission's regulations.

The Commission has made a proposed determination that the amendment request involves no significant hazards consideration. Under the Commission's regulations in 10 CFR 50.92, this means that operation of the facility in accordance with the proposed amendments would not (1) involve a significant increase in the probability or consequences of an accident previously evaluated; or (2) create the possibility of a new or different kind of accident from any accident previously evaluated; or (3) involve a significant reduction in a margin of safety. As required by 10 CFR 50.91(a), the licensee has provided its analysis of the issue of no significant hazards consideration, which is presented below:

1. The proposed change will not involve a significant increase in the probability or consequences of an accident previously evaluated. Southern Nuclear will employ, or contract as necessary, all technically qualified personnel necessary to become responsible for possession, management, operation, use, and maintenance at FNP. Therefore, it follows that the technical qualifications of employees of Southern Nuclear and its contractor will be consistent with those of Alabama Power Company presently. Personnel qualifications will remain the same as those discussed in the Technical Specifications and the FSAR (Final Safety Analysis Report).

The Alabama Power Company employees engaged in the operation of the plant will be reassigned to Southern Nuclear. The organizational structure of Southern Nuclear will provide for clear management control and effective lines of authority and communication between the organizational units involved in the management, operation, and technical support for the operation of the facility.

As a result of the proposed changes, there also will be no physical changes to the facility and all Limiting Conditions for Operation, Limiting Safety System Settings, and Safety Limits specified in the Technical Specifications will remain unchanged. With the exception of administrative changes to reflect the organization of Southern Nuclear, the emergency plan, security plan, QA (quality assurance) program and training program will be unaffected. Provisions will also be made for an orderly transfer of emergency preparedness and security

support agreements. Contractual agreements will ensure continued compliance with [10 CFR part 50, appendix A] General Design Criteria [sic] 17 as well as Southern Nuclear control over all activities within the exclusion area.

Therefore, the proposed change will not significantly increase the probability or consequences of an accident previously evaluated. In fact, due to the opportunity for increased management focus on nuclear operations afforded by this proposed amendment, the amendment will actually enhance public safety.

2. The proposed change will not create the possibility of a new or different kind of accident from any accident previously evaluated. The design and design bases of the plant remain the same. Therefore, the current plant safety analysis remains complete and accurate in addressing the licensing basis events and analyzing plant response and consequences.

The Limiting Conditions for Operation, Limiting Safety System Settings, and Safety Limits are not affected by the proposed change. With the exception of administrative changes to reflect the organization of Southern Nuclear, plant operating and emergency procedures are unaffected. As such, the plant conditions for which the design basis accident analyses have been performed are still valid. Therefore, the proposed change will not create the possibility of a new or different kind of accident than those previously evaluated.

3. The proposed change will not involve a significant reduction in a margin of safety. Since there will be no change to the physical design or operation of the plant, there will be no change to any margins. Further, the only changes to the Technical Specifications which have been proposed are to reflect the organization of Southern Nuclear. The proposed amendment therefore will not involve a significant reduction in a margin of safety.

The NRC staff has reviewed the licensee's analysis and, based on this review, it appears that the three standards of 10 CFR 50.92(c) are satisfied. Therefore, the NRC staff proposes to determine that the amendment request involves no significant hazards consideration.

The Commission is seeking public comments on this proposed determination. Any comments received within thirty (30) days after the date of publication of this notice will be considered in making any final determination. The Commission will not normally make a final determination unless it receives a request for a hearing.

Written comments may be submitted by mail to the Regulatory Publications Branch, Division of Freedom of Information and Publications Services, Office of Administration, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and should cite the publication date and page number of this **Federal Register** notice. Written comments may also be delivered to room P-223, Phillips Building, 7920 Norfolk Avenue, Bethesda, Maryland, from 7:30 a.m. to 4:15 p.m. Copies of written comments received may be examined at the NRC Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555. The filing of requests for hearing and petitions for leave to intervene is discussed below.

By October 21, 1991, the licensee may file a request for a hearing with respect to issuance of the amendments to the subject facility operating licenses and any person whose interest may be affected by this proceeding and who wishes to participate as a party in the proceeding must file a written request for a hearing and a petition for leave to intervene. Requests for a hearing and a petition for leave to intervene shall be filed in accordance with the Commission's "Rules of Practice for Domestic Licensing Proceedings" in 10 CFR part 2. Interested persons should consult a current copy of 10 CFR 2.714, which is available at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555 and at the local public document room located at Houston-Love Memorial Library, 212 W. Burdeshaw Street, Dothan, Alabama 36302. If a request for a hearing or petition for leave to intervene is filed by the above date, the Commission or an Atomic Safety and Licensing Board, designated by the Commission or by the Chairman of the Atomic Safety and Licensing Board Panel, will rule on the request and/or petition; and the Secretary or the designated Atomic Safety and Licensing Board will issue a notice of hearing or an appropriate order.

As required by 10 CFR 2.714, a petition for leave to intervene shall set forth with particularity the interest of the petitioner in the proceeding, and how that interest may be affected by the results of the proceeding. The petition should specifically explain the reasons why intervention should be permitted with particular reference to the following factors (1) the nature of the petitioner's right under the Act to be made party to the proceeding; (2) the nature and extent of the petitioner's property, financial, or other interest in the proceeding; and (3) the possible effect of any order which may be entered in the proceeding on the petitioner's interest. The petition should also identify the specific aspect(s) of the subject matter of the proceeding as to which petitioner wishes to intervene. Any person who has filed a petition for leave to intervene or who has been admitted as a party may amend the petition without requesting leave of the Board up to fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, but such an amended petition must satisfy the specificity requirements described above.

Not later than fifteen (15) days prior to the first prehearing conference scheduled in the proceeding, a petitioner shall file a supplement to the petition to intervene that must include a list of the contentions which are sought to be litigated in the matter. Each contention must consist of a specific statement of the issue of law or fact to be raised or controverted. In addition, the petitioner shall provide a brief explanation of the bases of the contention and a concise statement of the alleged facts or expert opinion which support the contention and on which the petitioner intends to rely in proving the contention at the hearing. The petitioner must also provide references to those specific sources and documents of which the petitioner is aware and on which the petitioner intends to rely to establish those facts or expert opinion. Petitioner must provide sufficient information to show that a genuine dispute exists with the applicant on a material issue of law or fact. Contentions shall be limited to matters within the scope of the amendments under consideration. The contention must be one which, if proven, would entitle the petitioner to relief. A petitioner who fails to file such a supplement which satisfies these requirements with respect to at least one contention will not be permitted to participate as a party.

Those permitted to intervene become parties to the proceeding, subject to any limitations in the order granting leave to intervene, and have the opportunity to participate fully in the conduct of the hearing, including the opportunity to present evidence and cross-examine witnesses.

If a hearing is requested, the Commission will make a final determination on the issue of no significant hazards consideration. The final determination will serve to decide when the hearing is held.

If the final determination is that the amendments request involves no significant hazards consideration, the Commission may issue the amendments and make them immediately effective, notwithstanding the request for a hearing. Any hearing held would take place after issuance of the amendments.

If a final determination is that the amendment request involves a significant hazards consideration, any

hearing held would take place before the issuance of any amendment.

Normally, the Commission will not issue the amendments until the expiration of the 30-day notice period. However, should circumstances change during the notice period such that failure to act in a timely way would result, for example, in derating or shutdown of the facility, the Commission may issue the license amendments before the expiration of the 30-day notice period, provided that its final determination is that the amendments involve no significant hazards consideration. The final determination will consider all public and State comments received. Should the Commission take this action, it will publish a notice of issuance and provide the opportunity for a hearing after issuance. The Commission expects that the need to take this action will occur very infrequently.

A request for a hearing or a petition for leave to intervene must be filed with the Secretary of the Commission, U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Docketing and Services Branch, or may be delivered to the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555, by the above date. Where petitions are filed during the last ten (10) days of the notice period, it is requested that the petitioner promptly so inform the Commission by a toll-free telephone call to Western Union at 1-(800) 325-6000 (in Missouri 1-(800) 342-6700). The Western Union operator should be given Datagram Identification Number 3737 and the following message addressed to Elinor G. Adensam: Petitioner's name and telephone number, date petition was mailed, plant name, and public date and page number of this **Federal Register** notice. A copy of the petition should also be sent to the Office of the General Counsel, U.S. Nuclear Regulatory Commission, Washington, DC 20555, and to James H. Miller, III, Esq., Balch and Bingham, P.O. Box 306, 1710 Sixth Avenue North, Birmingham, Alabama 35201, Attorney for the licensee.

Nontimely filings of petitions for leave to intervene, amended petitions, supplemental petitions and/or requests for hearing will not be entertained absent a determination by the Commission, the presiding officer or the Atomic Safety and Licensing Board that the petition and/or request should be granted based upon a balancing of the factors specified in 10 CFR 2.714(a)(1)(i)-(v) and 2.714(d).

For further details with respect to this action, see the application for amendment dated May 6, 1991, which is available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street, NW., Washington, DC 20555 and at the local public document room located at Houston-Love Memorial Library, 212 W. Burdeshaw Street, P.O. Box 1369, Dothan, Alabama 36302.

Dated at Rockville, Maryland, this 13th day of September 1991.

For the Nuclear Regulatory Commission.

Stephen T. Hoffman,

Project Manager, Projector Directorate II-1, Division of Reactor Projects—I/II, Office of Nuclear Reactor Regulation.

[FR Doc. 91-22630 Filed 9-18-91; 8:45 am]

BILLING CODE 7590-01-M

Commonwealth Edison Co., Byron Station, Unit Nos. 1 and 2, Braidwood Station, Unit Nos. 1 and 2; Issuance of Amendment to Facility Operating License

The U.S. Nuclear Regulatory Commission (Commission) has issued Amendment No. 42 to Facility Operating License No. NPF-37, Amendment No. 42 to Facility Operating License No. NPF-66, Amendment No. 31 to Facility Operating License No. NPF-72, and Amendment No. 31 to Facility Operating License No. NPF-77, issued to Commonwealth Edison Company (CECo, the licensee), which revised the Technical Specifications for operation of the Byron Station, Unit Nos. 1 and 2, and Braidwood Station, Unit Nos. 1 and 2, located in Ogle County and Will County, Illinois, respectively. The amendments are effective as of the date of issuance.

The amendments modified the Technical Specifications to (1) be consistent with Standard Technical Specifications, and (2) to reflect the installation of an automatic leakage rate detection system to provide continuous pressure testing of the containment air lock door seal gaskets.

The application for the amendments comply with the standards and requirements of the Atomic Energy Act of 1954, as amended (the Act), and the Commission's rules and regulations. The Commission has made appropriate findings as required by the Act and the Commission's rules and regulations in 10 CFR chapter I, which are set forth in the license amendments.

Notice of Consideration of Issuance of Amendment and Opportunity for Hearing in connection with this action was published in the **Federal Register** on November 4, 1988 (53 FR 44685). No request for a hearing or petition for leave to intervene was filed following this notice.

The Commission has prepared an Environmental Assessment related to the action and has determined not to prepare an environmental impact statement. Based upon the environmental assessment, the Commission has concluded that the issuance of these amendments will not have a significant effect on the quality of the human environment.

For further details with respect to the action see (1) the application for amendments dated October 4, 1988, as supplemented on August 14, 1989, March 20 and April 8, 1991, (2) Amendment Nos. 42, 42, 31, 31, to License Nos. NPF-37, NPF-66, NPF-72, NPF-77, respectively, (3) the Commission's related Safety Evaluation, and (4) the Commission's Environmental Assessment. All of these items are available for public inspection at the Commission's Public Document Room, the Gelman Building, 2120 L Street NW., Washington, DC and at the local public document rooms located at: for Byron, the Byron Public Library, 109 N. Franklin, P.O. Box 434, Byron, Illinois 61010; for Braidwood, the Wilmington Township Public Library, 201 S. Kankakee Street, Wilmington, Illinois 60481. A copy of items (2), (3), and (4) may be obtained upon request addressed to the U.S. Nuclear Regulatory Commission, Washington, DC 20555, Attention: Director, Division of Reactor Projects—III/IV/V.

Dated at Rockville, Maryland this 11th day of September 1991.

For the Nuclear Regulatory Commission.

Robert M. Pulsifer,

Project Manager, Project Directorate III-2, Division of Reactor Projects—III/IV/V, Office of Nuclear Reactor Regulation.

[FR Doc. 91-22631 Filed 9-18-91; 8:45 am]

BILLING CODE 7590-01-M

RAILROAD RETIREMENT BOARD

Privacy Act of 1974; Proposed Changes to Systems of Records

AGENCY: Railroad Retirement Board.

ACTION: Notice of proposed change to systems of records.

SUMMARY: The purposes of this document are to give notice of (1) 4 proposed routine uses in 3 systems of records; (2) a revision of an existing routine use in 1 system of records; (3) a change in the name of the system manager in 20 systems of records; and (4) a deletion of 1 system of records.

DATES: The systems of records for which a new or revised routine use is proposed shall be amended as proposed without

further notice October 21, 1991 unless comments are received before this date which would result in a contrary determination. All other changes shall be effective as of September 19, 1991.

ADDRESSES: Send comments to Beatrice Ezerski, Secretary to the Board, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

FOR FURTHER INFORMATION CONTACT: LeRoy Blommaert, Privacy Act/FOIA Officer, Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611, (312) 751–4548 (FTS 386–4548). The telephone device for the deaf numbers (TDD) are (312) 751–4701 (FTS 386–4701).

SUPPLEMENTARY INFORMATION:

Part I. Proposed Routine Uses

A proposed revision of routine use "p" in system of records RRB–21, Railroad Unemployment and Sickness Insurance Benefit System, would bring it into conformity with the wording of routine use "u" in system of records RRB–22, Railroad Retirement, Survivor, and Pensioner Benefit system, for the same disclosure. Both routine uses cover the disclosure of information to a railroad employer for the purposes of determining entitlement to and the rates of private supplemental benefits. In December 1980 (45 FR 80392), routine use "u" in system of records RRB–22 was amended to provide that disclosure could be made to an organization under contract to a railroad employer as well as to the railroad employer. At the time, comparable routine use "p" in system of records RRB–21 was not revised accordingly. The proposed revision to routine use "p" in system of records RRB–21 is designed to correct the oversight.

Proposed routine use "oo" to system of records RRB–22, Railroad Retirement, Survivor, and Pensioner Benefit System, would permit bonafide researchers doing epidemiological/mortality studies approved by the Railroad Retirement Board (RRB) to have access to claim folders in order to extract information pertaining to deceased beneficiaries. The Railroad Retirement Board has determined that this proposed routine use meets the compatibility requirement because it is a necessary and proper use.

Proposed routine use "dd" in system of records RRB–21, Railroad Unemployment and Sickness Insurance Benefit System, would permit disclosure to an employee's base-year and most recent railroad employer identifying information and information about the employee's claim for benefits in order to afford the employer the opportunity to submit information concerning the claim. In addition, after the claim has been paid if the base-year railroad employer appeals the decision awarding benefits, all information regarding the claim may be furnished to such base-year railroad employer that is necessary and appropriate for it to fully exercise its rights of appeal. This proposed routine use is necessary to effect certain provisions of the Railroad Unemployment Insurance and Retirement Improvement Act of 1988 (Pub. L. 100–647) (hereinafter referred to as the Improvement Act). This act had as one of its purposes changing the railroad unemployment system from one in which the employer's contribution rate was set on a system-wide basis to one where each employer's contribution rate is set based on benefits paid to employees of that employer. In connection with the change to an experience-rated system, the Improvement Act provided the opportunity for greater participation by employers in the claims adjudication process. Specifically, the Act required that the RRB notify employers after a claim has been filed and allow a period of time for them to submit information to the RRB that they believe is relevant to the adjudication of the claim. Additionally, after benefits have been paid on a claim, employers have the right to appeal the RRB decision and to be furnished with all information that is necessary and appropriate for them to exercise their rights in this regard. The Railroad Retirement Board has determined that this proposed routine use meets the compatibility requirement because it is a necessary and proper use.

Two routine uses proposed for system of records RRB–42, Uncollectible Benefit Overpayment Accounts, would enable the RRB to avail itself of the Federal salary/retirement benefit offset provisions of the Debt Collection Act of 1982. Routine use "g" would permit the RRB to disclose identifying information to the Defense Manpower Data Center of the Department of Defense, the Office of Personnel Management, and the Postal Service to enable those organizations to match the records sent by the RRB against their databases of active or retired Federal civilian or military employees. Under any computer matching program between the RRB and any of these three agencies the records matched would be identified to the RRB, and the RRB would be furnished the home or work addresses of the RRB debtors/Federal employee or retiree.

Proposed routine use "h" would enable the RRB to furnish identifying and debt information to the Department of Defense, the Office of Personnel Management, or any Federal agency relating to debtors the RRB has reason to believe are receiving either a military or civilian benefit or are active employees of the Federal agency. The ultimate purpose of the disclosure would be to recover the debt by offset from either the retiree's Federal civilian or military benefits or, if the debtor is a current Federal employee, from that employee's salary.

Under the Debt Collection Act of 1982, such proposed disclosures have been determined to be compatible with the purposes for which the information was collected.

The RRB is planning to enter into a computer matching agreement with the Defense Manpower Data Center of the Department of Defense. This entity, through an interagency agreement between the Department of Defense, the Office of Personnel Management, the Office of Management and Budget, and the Department of the Treasury, maintains a computerized database of employment records of Federal employees and military members both active and retired. Before any matching is conducted between the two agencies, the agencies will have complied with all provisions of the Computer Matching and Privacy Protection Act of 1988, including a specific notice in the **Federal Register**.

Part II: Changes in Other Categories

Storage

We are amending this item in system of records RRB–12, Railroad Employees Registration Form, to show that the only storage medium is microfiche. The paper forms have been destroyed.

System Manager(s)

Because of organizational and title changes, we changed the name of the system manager in the following systems: RRB–1, RRB–2, RRB–3, RRB–4, RRB–5, RRB–8, RRB–12, RRB–15, RRB–16, RRB–18, RRB–19, RRB–20, RRB–22, RRB–23, RRB–24, RRB–25, RRB–26, RRB–27, RRB–29, and RRB–42.

Part III: Deletion of Systems of Records

We are deleting system of records RRB–28, One Percent Historical File of Railroad Unemployment and Sickness Beneficiaries, because it is no longer maintained. All records in the system have been destroyed.

By authority of the Board.

Beatrice Ezerski,

Secretary to the Board.

RRB-1

SYSTEM NAME:

Social Security Benefit Vouchering System—RRB.

* * * * *

This section should be revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Director of Retirement and Survivor Programs, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

* * * * *

RRB-2

SYSTEM NAME:

Medical Examiner's Index—RRB.

* * * * *

This section should be revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Director of Disability and Medicare Operations, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

* * * * *

RRB-3

SYSTEM NAME:

Medicare: Part B (Supplementary Medical Insurance) Payment System—Contract to the Travelers Insurance Company—RRB.

* * * * *

This section should be revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Director of Disability and Medicare Operations, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

* * * * *

RRB-4

SYSTEM NAME:

Microfiche of Estimated Annuity, Total Compensation and Residual Amount File—RRB.

* * * * *

This section should be revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Director of Field Service, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

* * * * *

RRB-5

SYSTEM NAME:

Master File of Railroad Employees' Creditable Compensation—RRB.

Compensation—RRB.

* * * * *

This section should be revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Director of Research and Employment Accounts, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

* * * * *

RRB-8

SYSTEM NAME:

Railroad Retirement Tax Reconciliation System—RRB.

* * * * *

This section should be revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Chief Financial Officer, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

* * * * *

RRB-12

SYSTEM NAME:

Railroad Employee's registration File—RRB.

* * * * *

This section should be revised to read as follows:

STORAGE:

Microfiche.

* * * * *

This section should be revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Director of Research and Employment Accounts, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

* * * * *

RRB-15

SYSTEM NAME

Covered Abandoned Railroads—RRB.

* * * * *

This section should be revised to read as follows:

SYSTEMS MANAGER(S) AND ADDRESS:

Director of Research and Employment Accounts, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

* * * * *

RRB-16

SYSTEM NAME:

Social Security Administration Summary Earnings—RRB.

* * * * *

This section should be revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Director of Research and Employment Accounts, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

* * * * *

RRB-18

SYSTEM NAME:

Travel and Miscellaneous Voucher Examining System—RRB.

* * * * *

This section should be revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Chief Financial Officer, U.S. Railroad Retirement Board, Chicago, Illinois 60611.

* * * * *

RRB-19

SYSTEM NAME:

Payroll Record System—RRB.

This section should be revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Chief Financial Officer, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

* * * * *

RRB-20

SYSTEM NAME:

Health insurance and Supplementary Medical Insurance Enrollment and Premium Payment System (MEDICARE)—RRB.

* * * * *

This section should be revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Director of Disability and Medicare Operations, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

* * * * *

RRB-21

SYSTEM NAME:

Railroad Unemployment and Sickness Insurance Benefit System—RRB.

* * * * *

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

* * * * *

Routine use "p" is revised to read as follows:

* * * * *

p. Pursuant to a request from an employer covered by the Railroad Retirement Act or the Railroad Unemployment Insurance Act, or from an organization under contract to an employer or employers, information regarding the Board's payment of unemployment or sickness benefits, the methods by which such benefits are calculated, entitlement data and present address may be released to the requesting employer or the organization under contract to an employer or employers for the purposes of determining entitlement to and rates of private supplemental pension, sickness or unemployment benefits and to calculate estimated benefits due.

* * * * *

A new paragraph "dd" is added to read as follows:

* * * * *

dd. Identifying information and information about a claim for benefits filed may be disclosed to an employee's base-year railroad employer and the employee's most recent railroad employer, if different, in order to afford that employer or those employers the opportunity to submit information concerning the claim. In addition, after the claim has been paid, if the base-year railroad employer appeals the decision awarding benefits, all information regarding the claim may be disclosed to such base-year railroad employer that is necessary and appropriate for it to fully exercise its rights of appeal.

* * * * *

RRB-22

SYSTEM NAME:

Railroad Retirement, Survivor, and Pensioner Benefit System—RRB.

* * * * *

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

New paragraph "oo" is added to read as follows:

* * * * *

oo. Disclosure of information in claim folders is authorized for bonafide researchers doing epidemiological/mortality studies approved by the RRB who agree to record only information pertaining to deceased beneficiaries.

* * * * *

This section is revised to read as follows:

* * * * *

SYSTEM MANAGER(S) AND ADDRESS:

Director of Retirement and Survivor Programs, U.S. Railroad Retirement Board, Chicago Illinois 60611.

* * * * *

RRB-23

SYSTEM NAME:

Four Percent Wage History of Railroad Workers—RRB.

* * * * *

This section is revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Director of Research and Employment Accounts, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

* * * * *

RRB-24

SYSTEM NAME:

Research Master Record for Lump Sum and Residual Awards Under the Railroad Retirement Act—RRB.

* * * * *

This section should be revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Director of Research and Employment Accounts, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

* * * * *

RRB-25

SYSTEM NAME:

Research Master Record for Survivor Beneficiaries Under the Railroad Retirement Act—RRB.

* * * * *

This section is revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Director of Research and Employment Accounts, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

* * * * *

RRB-26

SYSTEM NAME:

Research Master Record for Retired Railroad Employees and their Dependents—RRB.

* * * * *

This section is revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Director of Research and Employment Accounts, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

* * * * *

RRB-27

SYSTEM NAME:

Railroad Retirement Board—Social Security Administration Financial Interchange System—RRB.

* * * * *

This section should be revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Director of Research and Employment Accounts, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

* * * * *

The following system of records should be deleted in its entirety.

RRB-28

SYSTEM NAME:

One Percent Historical File of Railroad Unemployment and Sickness Beneficiaries—RRB.

* * * * *

RRB-29

SYSTEM NAME:

Railroad Employees' Cumulative Gross Earnings Master File—RRB.

* * * * *

This section should be revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Director of Research and Employment Accounts, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

* * * * *

RRB-42

SYSTEM NAME:

Uncollectible Benefit Overpayment Accounts—RRB.

* * * * *

ROUTINE USES OF RECORDS MAINTAINED IN THE SYSTEM, INCLUDING CATEGORIES OF USERS AND THE PURPOSES OF SUCH USES:

New paragraphs "g" and "h" are added to read as follows:

* * * * *

g. Debtors' names, Social Security Numbers, Railroad Retirement claim numbers, and the amounts of debts owed may be disclosed to the Defense Manpower Data Center of the Department of Defense, to the Office of

Personnel Management, and to the Postal Service to conduct computer matching programs for the purpose of identifying and locating individuals who are receiving Federal salaries or benefit payments and delinquent in their repayment of debts owed to the U.S. Government under certain programs administered by the Railroad Retirement Board in order to collect the debts under the provisions of the Debt Collection Act of 1982 (P.L. 97–365) by voluntary repayment, or by administrative or salary offset procedures.

h. Debtors' names, Social Security Numbers, the amounts of debts owed, and the history of the debts, may be released to any Federal agency for the purpose of enabling such agency to collect debts on RRB's behalf by administrative or salary offset under the provisions of the Debt Collection Act of 1982 (P.L. 97–365).

* * * * *

This section should be revised to read as follows:

SYSTEM MANAGER(S) AND ADDRESS:

Chief Financial Officer, U.S. Railroad Retirement Board, 844 Rush Street, Chicago, Illinois 60611.

[FR Doc. 91–22582 Filed 9–18–91; 8:45 am]

BILLING CODE 7905–01

SECURITIES AND EXCHANGE COMMISSION

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Midwest Stock Exchange, Incorporated

September 13, 1991.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f–1 thereunder for unlisted trading privileges in the following securities:

Entertainment Publishing Corp.
Common Stock, $.01 Par Value (File No. 7–7251)
Hi-Lo Automotive, Inc.
Common Stock, $.01 Par Value (File No. 7–7252)
Public Storage Properties VI
Common Stock, $.01 Par Value (File No. 7–7253)
Public Storage Properties VII
Common Stock, $.01 Par Value (File No. 7–7254)

These securities are listed and registered on one or more other national securities exchange and is reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before October 4, 1991, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such application is consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,
Secretary.

[FR Doc. 91–22556 Filed 9–18–91; 8:45 am]

BILLING CODE 8010–01–M

[Release No. 34–29680; File No. SR–NYSE–91–26]

Self-Regulatory Organizations; Filing and Immediate Effectiveness of Proposed Rule Change by the New York Stock Exchange, Inc. Relating to the Absence of Fees for Off-Hours Trading

September 12, 1991.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on August 20, 1991, the New York Stock Exchange, Inc. ("NYSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

This rule change proposed that no fee will be charged for off-hours trading through December 31, 1991 for Crossing Session I and for an undetermined period of time for Crossing Session II.[1]

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

1. Purpose

The purpose of the rule change is to establish that no fee will be charged for system usage of Crossing Session I for the remainder of 1991 nor for use of Crossing Session II for an undetermined period of time. The purpose of this proposal is to encourage use of the new Crossing Sessions and to make the new sessions competitive with both overseas and domestic off-hours services.

2. Statutory Basis

The basis under the Act for the proposed rule change is the requirement under section 6(b)(4) that an exchange have rules that provide for the equitable allocation of reasonable dues, fees, and other charges among its members, issuers and other persons using its services.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange believes that the proposal to charge no fees will not impose any burden on competition that is not necessary or appropriate in the furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received From Members, Participants or Others

The Exchange has not solicited, and does not intend to solicit, comments regarding the proposed rule change. The Exchange has not received any unsolicited written comments from members or other interested parties.

[1] Recently, the Commission temporarily approved the New York Stock Exchange's ("NYSE") proposal to establish an off-hours trading ("OHT") facility consisting of Crossing Session I, for execution of both single-sided and coupled single-stock orders at 5 p.m., and Crossing Session II, for execution of crosses of multiple-stock, aggregate-price buy and sell orders between 4 and 5:15 p.m. See Securities Exchange Act Release No. 29237 (May 24, 1991), 56 FR 24853 (May 31, 1991) (temporary approval of SR–NYSE–90–52 and SR–NYSE–90–53).

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

The foregoing rule change establishes or changes a due, fee, or other charge imposed by the Exchange and therefore has become effective pursuant to section 19(b)(3)(A) of the Act and subparagraph (e) of Rule 19b-4 thereunder. At any time within 60 days of the filing of such proposed rule change, the Commission may summarily abrogate such rule change if it appears to the Commission that such action is necessary or appropriate in the public interest, for the protection of investors, or otherwise in furtherance of the purposes of the Act.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld form the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the NYSE. All submissions should refer to File No. SR-NYSE-91-26 and should be submitted by October 10, 1991.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91-22560 Filed 9-18-91; 8:45 am]

BILLING CODE 8010-01-M

[Release No. 34-29679; File No. SR-PSE-91-29]

Self-Regulatory Organizations; Notice of Filing of Proposed Rule Change by the Pacific Stock Exchange, Inc. Relating to Annual Fees or Listed Company Equity Listing Fees

September 12, 1991.

Pursuant to section 19(b)(1) of the Securities Exchange Act of 1934 ("Act"), 15 U.S.C. 78s(b)(1), notice is hereby given that on August 26, 1991, the Pacific Stock Exchange, Inc. ("PSE" or "Exchange") filed with the Securities and Exchange Commission ("Commission") the proposed rule change as described in Items I, II and III below, which Items have been prepared by the self-regulatory organization. The Commission is publishing this notice to solicit comments on the proposed rule change from interested persons.

I. Self-Regulatory Organization's Statement of the Terms of Substance of the Proposed Rule Change

The Exchange proposes to increase or adopt fees relating to original listings, maintenance fees, and application processing fees. The schedule of proposed fee increases is available through the Exchange Listing Department and at the Commission.

II. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

In its filing with the Commission, the self-regulatory organization included statements concerning the purpose of and basis for the proposed rule change and discussed any comments it received on the proposed rule change. The text of these statements may be examined at the places specified in Item IV below. The self-regulatory organization has prepared summaries, set forth in sections A, B, and C below, of the most significant aspects of such statements.

A. Self-Regulatory Organization's Statement of the Purpose of, and Statutory Basis for, the Proposed Rule Change

The Exchange proposes to increase or adopt fees relating to the listing of issues. Specifically these will include (1) the raising of its fee for an original listing from $7,500 to $10,000, and (2) the raising of the annual maintenance fee from $250 to $500 for additional issues with the maximum fee increasing from $3,000 to $5,000. The PSE also proposes that a new fee of $250 cover costs where a listed company changes its name or par value of its listed shares without any increase or decrease in outstanding stock. Finally, the PSE will adopt a $250 nonrefundable fee for each original listing application.

These changes are designed to reflect additional costs and they will keep the Exchange competitive with other equity exchanges offering similar services.

The proposed Exchange fee increase is consistent with section 6(b) of the Act in general and furthers the objectives of section 6(b)(4) in particular in that it is intended to assure the equitable allocation of reasonable fees, dues and other charges among members, issuers, and other persons using the Exchange's facilities.

B. Self-Regulatory Organization's Statement on Burden on Competition

The Exchange does not believe that the proposed change will impose any burden on competition that is not necessary or appropriate in furtherance of the purposes of the Act.

C. Self-Regulatory Organization's Statement on Comments on the Proposed Rule Change Received from Members, Participants or Others

The Exchange has neither solicited nor received comments on the proposed changes.

III. Date of Effectiveness of the Proposed Rule Change and Timing for Commission Action

Within 35 days of the publication of this notice in the **Federal Register** or within such other period (i) as the Commission may designate up to 90 days of such date if it finds such longer period to be appropriate and publishes its reasons for so finding or (ii) as to which the self-regulatory organization consents, the Commission will:

(A) By order approve the proposed rule change, or

(B) Institute proceedings to determine whether the proposed rule change should be disapproved.

IV. Solicitation of Comments

Interested persons are invited to submit written data, views and arguments concerning the foregoing. Persons making written submissions should file six copies thereof with the Secretary, Securities and Exchange Commission, 450 Fifth Street, NW., Washington, DC 20549. Copies of the submission, all subsequent amendments, all written statements with respect to the proposed rule change that are filed with the Commission, and all written communications relating to the proposed rule change between the Commission and any person, other than those that may be withheld from the public in accordance with the provisions of 5 U.S.C. 552, will be available for inspection and copying at the Commission's Public Reference Section, 450 Fifth Street, NW., Washington, DC 20549. Copies of such filing will also be available for inspection and copying at the principal office of the PSE. All submissions should refer to File No. SR-PSE-91-29 and should be submitted by October 10, 1991.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority

Margaret H. McFarland,

Deputy Secretary

[FR Doc. 91 22561 Filed 9 18–91, 8:45 am]

BILLING CODE 8010–01–M

Self-Regulatory Organizations; Applications for Unlisted Trading Privileges and of Opportunity for Hearing; Philadelphia Stock Exchange, Incorporated

September 13, 1991.

The above named national securities exchange has filed applications with the Securities and Exchange Commission ("Commission") pursuant to section 12(f)(1)(B) of the Securities Exchange Act of 1934 and Rule 12f–1 thereunder for unlisted trading privileges in the following securities:

RYMA Mortgage Investment
Common Stock, $0.01 Par Value (File No. 7–7234)
MiniInsured Fund
Common Stock, $0.10 Par Value (File No. 7–7235)
Morgan's Foods, Inc.
Common Stock, No Par Value (File No. 7–7236)
Michael Anthony Jewelers
Common Stock, $0.001 Par Value (File No. 7–7237)
Foundation Health Corporation
Common Stock, $0.01 Par Value (File No. 7–7238)
CNA Income Shares, Inc.
Common Stock, $1 Par Value (File No. 7–7239)
Public Storage Properties VII, Inc.
Common Stock, $0.01 Par Value (File No. 7–7240)
Public Storage Properties VI, Inc.
Common Stock, $0.01 Par Value (File No. 7–7241)
Hi-Lo Automotive, Inc.
Common Stock, $0.001 Par Value (File No. 7–7242)
Kmart Corporation Prp
Depositary Shares, No Par Value (File No. 7–7243)
State Mutual Securities Trust
Common Stock, $1 Par Value (File No. 7–7244)
Convertible Holding Inc. PrP
Capital Stock, $0.10 Par Value (File No. 7–7245)
CIM High Yield Securities
Common Stock, $0.01 Par Value (File No. 7–7246)
Mutual of Omaha Interest Shares, Inc.
Common Stock, $0.001 Par Value (File No. 7–7247)
Fox Meyer Corporation
Common Stock, $0.001 Par Value (File No. 7–7248)
Ahmanson (H.F.) & Company
Common Stock, No Par Value (File No. 7–7249)
Texas Instruments
Common Stock, $1 Par Value (File No 7–7250)

These securities are listed and registered on one or more other national securities exchange and are reported in the consolidated transaction reporting system.

Interested persons are invited to submit on or before October 4, 1991, written data, views and arguments concerning the above-referenced application. Persons desiring to make written comments should file three copies thereof with the Secretary of the Securities and Exchange Commission, 450 5th Street, NW., Washington, DC 20549. Following this opportunity for hearing, the Commission will approve the application if it finds, based upon all the information available to it, that the extensions of unlisted trading privileges pursuant to such applications are consistent with the maintenance of fair and orderly markets and the protection of investors.

For the Commission, by the Division of Market Regulation, pursuant to delegated authority.

Jonathan G. Katz,

Secretary.

[FR Doc. 91–22555 Filed 9–18–91; 8:45 am]

BILLING CODE 8010–01–M

[Release No. IC–18309; 812–7621]

The INDEPENDENCE CAPITAL Group of Funds, Inc.; Notice of Application

September 12, 1991.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption Under the Investment Company Act of 1940 (the "Act").

APPLICANT: The INDEPENDENCE CAPITAL Group of Funds, Inc. (the "Company").

RELEVANT 1940 ACT SECTIONS: Exemption requested under section 6(c) from Section 18(g).

SUMMARY OF APPLICATION: The Company seeks an order permitting it to implement a proposed dividend policy involving the issuance and sale of different classes of shares in different investment portfolios as described below.

FILING DATE: The application was filed on November 7, 1990 and amended on June 19, 1991.

HEARING OR NOTIFICATION OF HEARING: A order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving applicants with a copy of the request personally or by mail Hearing requests should be received by the SEC by 5:30 p m on October 7, 1991, and should be accompanied by proof of service on the applicants, in the form of an affidavit or for lawyers, a certificate of service Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested Persons may request notification of a hearing by writing to the SEC's Secretary.

ADDRESSES: Secretary, Securities and Exchange Commission, 450 15th Street, NW., Washington, DC 20549. Applicant, Bellevue Park Corporate Center, 103 Bellevue Parkway, Wilmington, Delaware 19809.

FOR FURTHER INFORMATION CONTACT: Marc Duffy, Staff Attorney, (202) 272–2511, or Max Berueffy, Branch Chief, (202) 272–3016 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. The Company is registered under the Act as an open-end management investment company. The Company has registered shares representing an interest in eight investment portfolios (individually, a "Fund," collectively, the "Funds") including the Money Market Fund (the "Money Fund"), the Tax-Free Money Market Fund (the "Tax-Free Fund"), and the Government Money Market Fund (the "Government Fund") (collectively the "Money Market Funds"). The Money Market Funds, in turn, are comprised of seven classes of shares.[1] The Company proposes to have three classes of shares in the Money Fund and two Classes of shares in each of the Tax-Free Fund and Government Fund. One class of shares in the Money Fund (the "Institutional Class") will be offered and sold to The Penn Mutual Life Insurance Company, its affiliates and other institutions ("Institutions") acting for their own account or on behalf of their customers. Another class of shares in the Money Fund and a class of

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[1] The Company has filed with the SEC a separate application requesting an exemption from sections 18 (f), (g), and (i) of the Act so that it may issue and sell multiple classes of shares having an interest in the same Fund. The application, if granted, would permit transfer agency and distribution expenses attributable to an Institutional, Janney or INDEPENDENCE CAPITAL Class of a Daily Dividend Fund to be allocated separately to that class (the "Multi-class Application").

shares in each of the Tax-Free Fund and Government Fund (collectively, the "Janney Class") are offered and sold to customers of Janney Montgomery Scott. The third class of shares in the Money Fund and the second class of shares in each of the Tax-Free Fund and Government Fund (collectively, the INDEPENDENCE CAPITAL Class") are offered and sold to investors other than Institutions and Janney Montgomery Scott customers.

2. Shares of the Money Market Funds are offered to the public without a sales load. Each Money Market Fund declares its net investment income as a dividend on a daily basis and pays dividends monthly. The net asset value per share of each Money Market Fund is computed using the amortized cost method of valuation under rule 2a-7 under the Act. The Company uses its best efforts to maintain the net asset value of each Money Market Fund at $1.00 per share. The Money Market Funds and any other existing or future investment portfolios of the Company that currently or in the future declare dividends on a daily basis and calculate their net asset value under the amortized cost method of valuation under 2a–7 under the Act are hereinafter collectively called the "Daily Dividend Funds."

3. Institutional Class shares in the Money Market Funds are sold each day that the Company, its custodian and the purchasing institution are open for business and will be redeemed on each day that the New York Stock Exchange (the "NYSE") and the Federal Reserve Bank of Philadelphia (the "FRB") are open for business. Janney and INDEPENDENCE CAPITAL class shares are sold and redeemed on each day that the NYSE and FRB are open for business.

4. Currently, shares of each Money Market Fund begin earning dividends on the day a purchase order is executed, and continue to earn dividends through and including the day before the shares are redeemed. Since the Company instituted this dividend policy it has retained the services of Independence Capital Management, Inc. ("Independence Capital") as transfer agent for the Institutional and INDEPENDENCE CAPITAL Classes of the Money Market Funds. Independence Capital's transfer agency systems are programmed for a dividend policy under which shares begin earning dividends on the next day after the shares are purchased through and including the day on which the shares are redeemed. Independence Capital has advised the Company that programming changes would not be cost-effective and would likely result in increased costs to the Company and its shareholders.

5. As a result, the Company wishes to implement the proposed dividend policy further described below whereby investors who purchase shares of the Janney Class of a Daily Dividend Fund will earn dividends beginning on the day their shares are purchased through and including the day before the investors are entitled to receive redemption proceeds. Investors who purchase shares of Institutional and INDEPENDENCE CAPITAL Classes of a Daily Dividend Fund will earn dividends beginning the next day after their shares are purchased through and including the day on which the shares are redeemed. This proposed dividend policy will be fully described in the prospectus of each class.

6. Under this proposed dividend policy, each Daily Dividend Fund will declare one dividend each day from the day's net income as of 4 p.m. Eastern Time. Each Daily Dividend Fund investor will participate in the particular Fund's dividend on a pro rata basis except that dividends may vary among the classes within a Daily Dividend Fund because the Multi-Class Application, if granted, would permit transfer agency and distribution expenses to be allocated separately. In declaring the daily dividend, each Daily Dividend Fund will utilize two record dates. Dividends will be declared and payable on shares of the Janney Class of a Daily Dividend Fund that are outstanding at the close of business the day the dividend is declared (or at 5 p.m. if such day is not a business day), while dividends will be declared and payable on shares of the Institutional and INDEPENDENCE CAPITAL Classes of a Daily Dividend Fund that are outstanding at the close of business on the day before the dividend is declared (or at 5 p.m. if such previous day is not a business day).

Applicant's Legal Analysis

1. The Company requests an exemptive order pursuant to Section 6(c) to the extent that the proposed dividend policy might be deemed to constitute a "senior security" within the meaning of section 18(g) and therefore be prohibited by section 18(f)(1) of the Act.

2. Section 18(g) of the Act, in pertinent part, defines senior security to include any bond, debenture, note, or similar obligation or instrument constituting a security and evidencing indebtedness, and any stock of a class having priority over any other class as to distribution of assets or payment of dividends. Section 18(f)(1) of the Act, generally, makes it unlawful for any open-end investment company to issue any class of senior security or to sell any senior security of which it is the issuer, except for certain bank borrowings.

3. The Company asserts that its proposed dividend policy will not result in any class of shares in a Daily Dividend Fund having priority over any other class of shares in the same Fund as to the distribution of assets (in liquidation or otherwise) or as to payment of dividends, and that all shares of each Daily Dividend Fund will be entitled to participate equally in the dividends of the particular Fund, except as may be permitted by the Multi-Class Application. However, to eliminate any possibility that the Company's proposed dividend policy might be deemed to result in a "senior security," the Company requests an exemptive order from the SEC.

4. The SEC is authorized by section 6(c) of the Act to exempt, *inter alia*, any "security" or any "class or classes of * * * securities" from any provision of the Act or rule thereunder, "if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of (the Act)."

5. The proposed dividend policy would permit the Company to retain Independence Capital without additional costs associated with programming changes. This would benefit the Company and its shareholders because Independence Capital is capable of providing the Company with a number of beneficial and important services and shareholder purchase and redemption options at relatively low fees and costs. Thus, the proposed dividend policy and requested relief is grounded on the Company's legitimate business needs.

6. For the reasons set forth above, the Company submits that the requested exemption is appropriate in the public interest and is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

For the SEC, by the Division of Investment Management, pursuant to delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91–22557 Filed 9–18–91; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-18311; 812-7506]

The INDEPENDENCE CAPITAL Group of Funds, Inc. et al.; Notice of Application

September 12, 1991.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the "Act").

APPLICANTS: The INDEPENDENCE CAPITAL Group of Funds, Inc. (the "Company"), Independence Capital Management, Inc. ("ICMI"), Janney Montgomery Scott, Inc. ("JMS") and Penn Mutual Equity Services ("PMES").

RELEVANT 1940 ACT SECTIONS: Exemption requested under section 6(c) from section 18(f), 18(g) and 18(i).

SUMMARY OF APPLICATION: Applicants seek a conditional order permitting the issuance and sale of multiple classes of securities representing interests in certain existing money market funds as well as any other existing or future investment portfolios of the Company that in the future declare dividends on a daily basis and calculate their net asset value using the amortized cost method of valuation. The classes would be identical except for differences related to rule 12b–1 plan expenses, transfer agency expenses, exchange privileges, class designation, and voting rights and, subject to a pending application, different dividend declaration dates.

FILING DATE: The application was filed on April 16, 1990 and amended on January 23, April 10 and May 17, 1991.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on October 7, 1991, and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicants: Company, Bellevue Corporate Center, 103 Bellevue Parkway, Wilmington, Delaware 19809; ICMI, 600 Dresher Road, Horsham, Pennsylvania 19044; JMS, 1601 Market Street, Philadelphia, Pennsylvania 19103; and PMES, 5 Penn Center Plaza, Philadelphia, Pennsylvania 19103.

FOR FURTHER INFORMATION CONTACT: Marc Duffy, Staff Attorney, (202) 272–2511, or Max Berueffy, Branch Chief, (202) 272–3016 (Office of Investment Company Regulation, Division of Investment Management).

SUPPLEMENTARY INFORMATION: Following is a summary of the application. The complete application is available for a fee from the SEC's Public Reference Branch.

Applicants' Representations

1. The Company has registered under the Act as an open-end management investment company. The Company has registered shares representing interests in eight investment portfolios (individually, a "Fund," collectively, the "Funds"), including the three money market funds: the Money-Market Fund (the "Money Fund"), the Tax-Free Money Market Fund (the "Tax-Free Fund") and the Government Money Market Fund (the "Government Fund") (collectively, the "Money Market Funds"). Applicants request that the relief sought by this application extend to the Money Market Funds, and any other existing or future investment portfolios of the Company that in the future declare dividends on a daily basis and calculate their net asset value using the amortized cost method of valuation of rule 2a–7 under the Act (the "Daily Dividend Funds").

2. The Company proposes to issue multiple classes of securities representing interests in the Money Market Funds. The Money Fund will have three classes of shares and each of the Tax-Free Fund and Government Fund will have two classes of shares. One class of shares in the Money Fund (the "Institutional Class") will be offered and sold to The Penn Mutual Life Insurance Company ("Penn Mutual"), its affiliates and other institutions ("Institutions") acting for their own account or on behalf of their customers. Another class of shares in the Money Fund and a class of shares in each of the Tax-Free Fund and Government Fund (collectively, the "Janney Class") will be offered and sold to customers of JMS. The third class of shares in the Money Fund and the second class of shares in each of the Tax-Free Fund and Government Fund (collectively, the "INDEPENDENCE CAPITAL Class") will be offered and sold to investors other than Institutions and JMS customers.

3. ICMI serves as the Company's investment adviser and as the transfer agent for the Institutional Class and the INDEPENDENCE CAPITAL Class. Provident National Bank ("Provident") serves as the Company's custodian. Provident Financial Processing Corporation ("PFPC") serves as the Company's administrator and as the transfer agent for the Janney Class. PMES serves as the distributor for the Institutional and INDEPENDENCE CAPITAL Classes. JMS serves as the distributor for the Janney Class. Provident and PFPC are indirect subsidiaries of PNC Financial Corp. ICMI, PMES and JMS are direct or indirect subsidiaries of Penn Mutual.

4. Each Class of a Daily Dividend Fund would be identical in all respects except for class designation, exchange privileges, the allocation of certain expenses and voting rights.[1] Each Daily Dividend Fund's shares would also be subject to the same investment objective, policies, and limitations. They would differ, however, in that: (a) each Institutional, Janney and INDEPENDENCE CAPITAL Class will have different class designations; (b) each Janney and INDEPENDENCE CAPITAL Class will bear the payments incurred pursuant to the terms of a 12b–1 plan (a "12b–1 Plan") applicable to that class; (c) each Institutional, Janney and INDEPENDENCE CAPITAL Class will also bear transfer agency expenses directly attributable to that Class; (d) only the holders of the shares of the Janney or INDEPENDENCE CAPITAL Classes involved would be entitled to vote on matters pertaining to the 12b–1 Plan and any related agreements relating to such class or classes (for example, the adoption, amendment or termination of a 12b–1 Plan) in accordance with the provisions of rule 12b–1; and (e) different dividend declaration dates if permitted by the SEC pursuant to the Dual Dividend Application. The Institutional, Janney and INDEPENDENCE CAPITAL Classes of a Daily Dividend Fund may also differ with respect to exchange privileges. Shares of a Janney or INDEPENDENCE CAPITAL Class of a particular Fund are exchangeable for shares of a Janney or INDEPENDENCE CAPITAL Class, respectively, of another Money Market Fund. Shares of the INDEPENDENCE

[1] The Company has also applied for an order allowing the classes to have different dividend declaration dates. *See* File No. 812–7621 (the "Dual Dividend Application"). Janney Class investors would receive their first dividend on the day their purchase order is executed and their last dividend on the day before redemption. Institutional and Independence Capital Class investors would receive their first dividend on the next day after their purchase order is executed and their last dividend on the day of redemption.

CAPITAL Class are also exchangeable for shares of a Fund other than a Money Market Fund, as are shares of the Institutional Class.

5. The 12b–1 Plan will provide for the payment of compensation ("12b–1 Payments") in connection with the distribution of shares of the Janney and INDEPENDENCE CAPITAL Classes. An explicit purpose of the 12b–1 Plan will be to finance distribution activities in connection with the sale of Janney and INDEPENDENCE CAPITAL Class shares. In addition, the 12b–1 Plan would permit the Company's distributors to pay fees ("Service Fees," and collectively with 12b–1 Payments, "Plan Payments") for support services provided by securities dealers, financial institutions or other industry professionals ("Service Organizations"). Payments by the Company under the 12b–1 Plan will be for distribution-related expenses incurred in connection with the sale of Janney or INDEPENDENCE CAPITAL shares and shareholder support services. The shareholder support services provided by Service Organizations are intended to augment and not duplicate the services provided to the Company by its service contractors (e.g., administrator, transfer agents, custodian and distributors). Only expenditures properly attributable to the sale or servicing of a particular class of shares will be charged to that class; expenditures not related to the sale or servicing of a particular class will not be charged to that class.

6. Payments by a Daily Dividend Fund under the current 12b–1 Plan will not exceed .10% (annualized) of the average daily net asset value of the Company's outstanding Janney and INDEPENDENCE CAPITAL Class shares. The 12b–1 Plan and any related agreements will be subject to all of the provisions of rule 12b–1 under the Act.

7. By offering Institutional, Janney and INDEPENDENCE CAPITAL Class shares as described above, the Company expects to achieve added flexibility in meeting the service and investment needs of shareholders and future investors. The Company believes that the expense of the Plan Payments made with respect to a particular Janney or INDEPENDENCE CAPITAL Class should be appropriately borne by the shareholders of such class because the benefits of the 12b–1 Plans will accrue to them. It would be inefficient, and in some instances economically or operationally unfeasible, to organize a separate Daily Dividend Fund for each Institutional, Janney or INDEPENDENCE CAPITAL Class.

8. The net asset value of all outstanding shares representing an interest in the same Daily Dividend Fund will be computed on the same days and at the same times by adding the value of all portfolio securities and other assets belonging to the Daily Dividend Fund involved, subtracting the liabilities charged to such Daily Dividend Fund and Dividing the result by the number of such outstanding shares. Further, the gross income of a Daily dividend Fund will be allocated on a pro-rata basis to each outstanding share in the Daily Dividend Fund regardless of class, and all expenses incurred by the Daily Dividend Fund will be borne on a pro-rata basis by such outstanding shares except for the payments that are made under the 12b–1 Plan that has been adopted in connection with the Janney and INDEPENDENCE CAPITAL Class and for transfer agency expenses.

9. Because of the Plan Payments and transfer agency expenses, the net income of (and dividends payable to) each class would be somewhat different than the net income of (and dividends payable to) the other classes in the same Daily Dividend Fund. Dividends paid to each class in a Daily Dividend Fund will, however, be declared and paid on the same days and at the same times, (except as otherwise approved by the SEC pursuant to the Dual Dividend Application) and, except as noted with respect to Plan Payments and transfer agency expenses, will be determined in the same manner and paid in the same amounts.

Applicant's Legal Analysis

1. Applicants request an exemptive order pursuant to section 6(c) of the Act to permit the proposed issuance and sale of Institutional, Janney and INDEPENDENCE CAPITAL Class shares representing interests in Daily Dividend Funds (the "Multi-Class System") to the extent that the issuance and sale of such shares, including the allocation of voting rights thereto and the payment of dividends thereon as described above, might be deemed: (a) to result in a "senior security" within the meaning of section 18(g) of the Act and to be prohibited by section 18(f)(1) of the Act; and (b) to violate the equal voting provisions of section 18(i) of the Act. The proposed allocation of expenses and voting rights in the manner described is equitable and will not discriminate against any group of shareholders. Investors purchasing Institutional, Janney and INDEPENDENCE CAPITAL Class shares and receiving the services provided under the 12b–1 Plan and the transfer agency services associated with the particular shares, will bear the costs associated with such services. Investors will also enjoy exclusive shareholder voting rights with respect to matters affecting their 12b–1 Plan.

2. The proposed arrangement does not involve borrowings and does not affect the Company's existing assets or reserves. Nor will the proposed arrangement increase the speculative character of the shares in a Daily Dividend Fund because all shares in a Daily Dividend Fund will participate pro-rata in all of such Daily Dividend Fund's income and expenses (with the exception of the Plan Payments and transfer agency expenses). Accordingly, the requested exemption is appropriate in the public interest and is consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act.

Applicants' Conditions

Applicants agree that any order granting the requested relief shall be subject to the following conditions:

1. Each Institutional, Janney and INDEPENDENCE CAPITAL Class of a Daily Dividend Fund will represent an interest in the same portfolio of investments of the Company, and will be identical in all respects, except as set forth below. The only differences of such Classes will relate solely to: (a) The impact of Plan Payments, the transfer agency expenses attributable to each such Class, and any other incremental expenses subsequently identified that should be properly allocated to one class that shall be approved by the SEC pursuant to an amended order; (b) different dividend declaration dates if approved by the Dual Dividend Application; (c) the fact that the Institutional Class will not vote, and the Janney and INDEPENDENCE CAPITAL Classes will vote separately, with respect to the Company's 12b–1 Plans; (d) the different exchange privileges of such classes; and (e) the designation of each such class.

2. The directors, including a majority of the independent directors, will approve the Multi-Class System. The minutes of the meetings of the directors of the Company regarding the deliberations of the directors with respect to the approvals necessary to implement the Multi-Class System will reflect in detail the reasons for the directors' determination that the proposed Multi-Class System is in the best interests of both the Company and its shareholders.

3. On an ongoing basis, the directors of the Company, pursuant to their

fiduciary responsibilities under the Act and otherwise, will monitor the Company for the existence of any material conflicts between the interests of the Institutional, Janney and INDEPENDENCE CAPITAL Classes. The directors, including a majority of the independent directors, shall take such action as is reasonably necessary to eliminate any such conflicts that may develop. The Company's adviser and distributors will be responsible for reporting any potential or existing conflicts to the directors. If a conflict arises, the Company's adviser and distributors at their own cost will remedy such conflict up to and including establishing a new registered management investment company.

4. Any rule 12b–1 plan adopted or amended to permit the assessment of a rule 12b–1 fee on any class of shares which has not had its rule 12b–1 plan approved by the public shareholders of that class will be submitted to the public shareholders of such class for approval at the next meeting of shareholders after the initial issuance of the class of shares. Such meeting is to be held within 16 months of the date that the registration statement relating to such class first becomes effective or, if applicable, the date that the amendment to the registration statement necessary to offer such class first becomes effective.

5. The directors of the Company will receive quarterly and annual statements concerning distribution and shareholder servicing expenditures for the Janney and INDEPENDENCE CAPITAL Classes complying with paragraph (b)(3)(ii) of rule 12b–1, as it may be amended from time to time. In the statements, only expenditures properly attributable to the sale or servicing of a particular class of shares will be used to justify any distribution or servicing fee charged to that class. Expenditures not related to the sale or servicing of a particular class will not be presented to the directors to justify any fee attributable to that class. The statements, including the allocations upon which they are based, will be subject to the review and approval of the independent directors in the exercise of their fiduciary duties.

6. Dividends paid by the Company with respect to each class of a Daily Dividend Fund, to the extent any dividends are paid, will be calculated in the same manner, at the same time, on the same day, and will be in the same amount as dividends paid by the Company with respect to the other classes in the same Fund, except that any Plan Payments and transfer agency expenses relating to a class will be borne exclusively by that class and except as otherwise permitted by the SEC pursuant to the Dual Dividend Application.

7. The methodology and procedures for calculating the net asset value and dividends and distributions of the Institutional, Janney and INDEPENDENCE CAPITAL Classes and the proper allocation of expenses between those classes has been reviewed by an expert (the "Expert") who has rendered a report to the Company, which has been provided to the staff of the SEC, that such methodology and procedures are adequate to ensure that such calculations and allocations will be made in an appropriate manner. On an ongoing basis, the Expert, or an appropriate substitute Expert, will monitor the manner in which the calculations and allocations are being made and, based upon such review, will render at least annually a report to the Company that the calculations and allocations are being made properly. The reports of the Expert shall be filed as part of the periodic reports filed with the SEC pursuant to sections 30(a) and 30(b)(1) of the Act. The work papers of the Expert with respect to such reports, following request by the Company (which the Company agrees to provide), will be available for inspection by the SEC staff upon the written request to the Company for such work papers by a senior member of the Division of Investment Management, limited to the Director, an Associate Director, the Chief Accountant, the Chief Financial Analyst, an Assistant Director and any Regional Administrator or Associate and Assistant Administrators. The initial report of the Expert is a "Special Purpose" report on the "Design of a System" and the ongoing reports will be "Special Purpose" reports on the "Design of a System and Certain Compliance Tests" as defined and described in SAS No. 44 of the AICPA, as it may be amended from time to time, or in similar auditing standards as may be adopted by the AICPA from time to time.

8. The Company has adequate facilities in place to ensure implementation of the methodology and procedures for calculating the new asset value and dividends and distributions of the Institutional, Janney and INDEPENDENCE CAPITAL Classes of shares and the proper allocation of expenses between such classes of shares and this representation will be concurred with by the Expert in the initial report referred to in condition (7) above and will be concurred with by the Expert, or an appropriate substitute Expert, on an ongoing basis at least annually in the ongoing reports referred to in condition (7) above. The Company will take immediate corrective measures if this representation is not concurred in by the Expert or appropriate substitute Expert.

9. The prospectus for each Daily Dividend Fund with more than one class will contain a statement to the effect that a saleperson and any other person entitled to receive compensation for selling or servicing Company shares may receive different compensation with respect to one particular class of shares over another class in the same Daily Dividend Fund.

10. The Company's distributors will adopt compliance standards as to when each Institutional, Janney and INDEPENDENCE CAPITAL Class of shares may appropriately be sold to particular investors. The Company will require all persons selling Institutional, Janney and INDEPENDENCE CAPITAL Class shares to agree to conform to such standards.

11. The conditions pursuant to which the exemptive order is granted and the duties and responsibilities of the directors of the Company with respect to the Multi-Class System will be set forth in guidelines which will be furnished to the directors.

12. Each Daily Dividend Fund will disclose the respective expenses, performance data, distribution arrangements, services, fees, sales loads, deferred sales loads, and exchange privileges applicable to shares of Institutional, Janney and INDEPENDENCE CAPITAL Classes of the same Daily Dividend Fund in every prospectus, regardless of whether such classes of shares are offered through each prospectus. Each Daily Dividend Full will disclose the respective expenses and performance data applicable to all classes of shares of the same Daily Dividend Fund in every shareholder report. To the extent any advertisement or sales literature describes the expenses or performance data applicable to any class of shares, it will also disclose the respective expenses and/or performance data applicable to all classes of shares in the same Daily Dividend Fund. The information provided by the Company for publication in any newspaper or similar listing of a Daily Dividend Fund's net asset value and public offering price will present each class of shares in the same Daily Dividend Fund separately.

13. Each agreement that provides for Service Fees will contain a

representation by the Service Organization that any compensation payable to the Service Organization in connection with the investment of its customers' assets in the Company (a) will be disclosed by it to its customers, (b) will be authorized by its customers and (c) will not result in an excessive fee to the Service Organization.

14. In evaluating a 12b–1 Plan that provides for Service Fees, the directors will specifically consider whether (a) the 12b–1 Plan is in the best interest of the applicable classes and their respective shareholders, (b) the services to be performed by the Service Organizations pursuant to the 12b–1 Plan are required for the operation of the applicable classes, (c) the Service Organizations can provide services at least equal, in nature and quality, to those provided by others, including the Company, providing similar services, and (d) the Service Fees for such services are fair and reasonable in light of the usual and customary charges made by other entities, especially non-affiliated entities, for services of the same nature and quality.

15. Each agreement that provides for Service Fees and is entered into pursuant to the 12b–1 Plan will provide that, in the event an issue pertaining to the 12b–1 Plan is submitted for shareholder approval, the Service Organization will vote any shares held for its own account in the same proportion as the vote of those shares held for its customers' accounts.

16. Applicants acknowledge that the grant of the exemptive order requested by the application will not imply SEC approval, authorization or acquiescence in any particular level of Plan Payments that the Company may make in reliance on the exemptive order.

17. A Daily Dividend Fund will have more than one class of shares outstanding only when and for so long as it declares dividends on a daily basis, accrues its Plan Payments and transfer agency expenses daily, and has received undertakings from the persons that are entitled to receive Plan Payments and transfer agency expenses waiving such portion of any such payments to the extent necessary to assure that payments (if any) required to be accrued by any class of shares on any day do not exceed the income to be accrued to such class on that day. In this manner, the net asset value per share for all shares in a Daily Dividend Fund will remain the same.

For the SEC, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91-22558 Filed 9-18-91; 8:45 am]

BILLING CODE 8010-01-M

[Rel. No. IC-18310; 812-7231]

The Mackenzie Funds Inc. et al.; Notice of Application

September 12, 1991.

AGENCY: Securities and Exchange Commission ("SEC").

ACTION: Notice of Application for Exemption under the Investment Company Act of 1940 (the "Act").

APPLICANTS: The Mackenzie Funds Inc. ("Mackenzie") and Mackenzie Investment Management Inc. ("MIMI").

RELEVANT ACT SECTIONS: Exemption requested pursuant to section 6(c) from sections 18(f), 18(g), and 18(i).

SUMMARY OF APPLICATION: Applicants seek a conditional order pursuant to section 6(c) of the Act to permit the issuance and sale of two classes of securities representing interests in Mackenzie Growth and Income Fund (the "Fund") and to permit the issuance and sale of two classes of securities representing interests in any fund, or series thereof, included in the Mackenzie Group of Funds.[1] The classes would be identical in all respects except for differences relating to distribution expenses, payment of dividends, the Class A conversion feature, voting rights relating to rule 12b–1 plans, certain exchange privileges, and the designation of each class of shares of the Fund.

FILING DATE: The application was filed on February 1, 1989 and was amended on February 1, 1991, April 9, 1991 and August 23, 1991.

HEARING OR NOTIFICATION OF HEARING: An order granting the application will be issued unless the SEC orders a hearing. Interested persons may request a hearing by writing to the SEC's Secretary and serving Applicants with a copy of the request, personally or by mail. Hearing requests should be received by the SEC by 5:30 p.m. on October 7, 1991, and should be accompanied by proof of service on the Applicants, in the form of an affidavit or, for lawyers, a certificate of service. Hearing requests should state the nature of the writer's interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the SEC's Secretary.

ADDRESSES: Secretary, SEC, 450 5th Street, NW., Washington, DC 20549. Applicants: The Mackenzie Funds Inc. or Mackenzie Investment Management Inc., 700 South Federal Highway, Suite 300, Boca Raton, Florida 33432.

FOR FURTHER INFORMATION CONTACT: Elizabeth G. Osterman, Staff Attorney, at (202) 504–2524, or Jeremy N. Rubenstein, Assistant Director, at (202) 272–3023 (Division of Investment Management, Office of Investment Company Regulation).

SUPPLEMENTARY INFORMATION: The following is a summary of the application. The complete application may be obtained for a fee at the SEC's Public Reference Branch.

Applicant's Representations

1. Mackenzie is an open-end management investment company registered under the Act. MIMI, a registered investment adviser and broker-dealer, serves as Mackenzie's distributor and administrator. MIMI also serves as the Fund's investment adviser. (MIMI is sometimes referred to herein as the "Distributor" or the "Adviser.") The Fund currently offers a single class of shares at net asset value plus, with certain exceptions,[2] a front-end sales load equal to 2.75% of the price to the public for purchases of less than $100,000, scaling down in steps to no sales load for purchases of $3 million or more (the "Sales Load"). The Fund is subject to a rule 12b–1 distribution plan (the "Rule 12b–1 Plan") pursuant to which it makes payments to the Distributor at a rate of 1.20% of the

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[1] The Mackenzie Group of Funds, as such term is used herein, includes future series authorized by Mackenzie and any registered open-end investment companies (or series thereof) that are part of the same group of investment companies, and (a) whose investment adviser is Mackenzie Financial Corporation ("MFC"), MIMI (a wholly-owned subsidiary of MFC) or an investment adviser that is under common control with MIMI, (b) whose principal underwriter is MIMI, or a principal underwriter that is under common control with MIMI, (c) that hold themselves out to investors as being related for purposes of investment and investor services and (d) whose shares are divided into two classes of shares which may be issued and sold on a basis identical in all material respects to those described in the application.

[2] In reliance on rule 22d–1 under the Act, Fund shares are sold without a sales load to (1) officers and directors of Mackenzie and a separately registered investment company (the "Trust") (and their relatives), (2) officers, directors and employees of MIMI and Mackenzie Financial Corporation (parent corporation of MIMI), (3) personnel of Mackenzie's and the Trust's transfer agent who are dedicated to serving funds sponsored by MIMI and (4) directors, officers, partners, registered representatives and employees (and their relatives) of dealers having a sales agreement with MIMI or trustees or custodians of any qualified retirement plan or Individual Retirement Account established for the benefit of a person described herein.

Fund's daily net assets. The Fund currently declares dividends on its shares daily, payable quarterly, at a rate of 5% per annum of net asset value, regardless of whether a distribution is made as a dividend, a short-term capital gains distribution, or as a return of capital.

2. Mackenzie and MIMI have entered into an administrative services agreement (the "Services Plan") pursuant to which MIMI provides various services, including responding to shareholder inquiries, endeavoring to resolve shareholder account problems, dealing with shareholder complaints, providing information required by certain shareholders, processing wire order purchase and redemption requests, coordinating and monitoring purchase, redemption and transfer requests made through the National Securities Clearing Corporation and providing executive, clerical and secretarial personnel to carry out those responsibilities. MIMI also provides administrative services to the Fund, including maintenance of registration or qualification of Fund shares under state securities laws, preparing federal, state and local income tax returns and preparing financial and other information for prospectuses, statements of additional information, and periodic reports to shareholders. The Fund pays MIMI a monthly fee based on the Fund's average daily net asset value during the preceding month as compensation under the Services Plan.

3. Applicants seek an exemptive order from the SEC permitting the Fund to offer two classes of shares (Class A and Class B). Each share in the Fund will represent an equal, pro-rata interest in the same portfolio of investments of the Fund and be identical in all respects, except as set forth below. The only differences between Class A shares and Class B shares will relate solely to: (a) The impact of the differing distribution fees, (b) differences in Fund policy with respect to declaration of distributions with respect to the two classes, (c) voting rights with respect to the Rule 12b–1 Plan, as amended to provide for the dual distribution system described herein (the "Amended 12b–1 Plan"), (d) the conversion feature of the Class A shares, (e) exchange privileges and (f) the designation of classes. Applicants state that any classes of shares issued pursuant to an order granted in connection with the application would comply with all representations and conditions set forth in the Application.

4. Under the proposed arrangement, currently outstanding Fund shares will be reclassified as Class A shares. Class A shares will be subject to the Amended 12b–1 Plan. Pursuant to such plan, Class A shares will be required to pay (a) an amount equal to .25% of the average daily net assets attributable to that class (the "Basic Distribution Fee") and (b) an additional amount equal to .95% of the average daily net assets attributable to that class (the "Additional Distribution Fee") as compensation to the Distributor. Class A shares also will be subject to the Sales Load. Distributions, including distributions made to satisfy the distribution requirements of Subchapter M of the Internal Revenue Code of 1986, may be made at the discretion of the board of directors.[3] Class A shares will be offered directly to the public and will convert to Class B shares following a specified period of time which is estimated to be sufficient for MIMI to have been compensated for distribution expenses related to the shares. The time period that Class A shares will be required to be held before conversion will depend upon the amount purchased at a given time, regardless of any redemptions during such period or additional amounts purchased, and will vary from two to eight years.

5. Class B Shares will be identical to Class A Shares, except as set forth below. There will be no sales load charged with respect to the issuance of Class B shares. Class B shares will be subject to the Amended 12b–1 Plan, however, Class B shares will be required to pay only the Basic Distribution Fee thereunder. The Fund will declare distributions daily, payable quarterly, at a rate equal to .95% per annum of the net assets attributable to Class B shares.[4] Class B shares will consist only of Class A shares that have converted to Class B shares, shares purchased by holders of outstanding Class A or Class B shares through distribution reinvestment,[5] shares purchased by the groups of persons specified in note 2 *supra*, and shares issued in exchange for shares of other series in the Mackenzie Group of Funds, provided a sales load was paid on such other shares.

6. If a shareholder holds both Class A and Class B shares, Mackenzie will always redeem Class A shares first, in the order that will result in the shortest holding period before conversion for the remaining Class A shares (if any) after the redemption.

7. The Distributor will continue to provide services under the Services Plan. Services under the Services Plan will be applied uniformly with respect to each class. Fees under the Services Plan will be allocated on the basis of the percentage that each class bears to the aggregate net asset value of the Fund.

8. Class A shares may be exchanged for shares of any fund, or series thereof, in the Mackenzie Group of Funds upon payment of any differential in sales loads in compliance with rule 11a–3. Class B shares may be exchanged for shares in any fund, or series therein, in the Mackenzie Group of Funds. All exchanges will be subject to the minimum investment conditions for each exchanged fund.

Applicants' Arguments

1. Applicants request an exemptive order under section 6(c) to permit the proposed creation, issuance and sale of two classes of shares representing interests in the Fund (or any fund, or series thereof, in the Mackenzie Group of Funds) to the extent that such issuance and sale might (a) be deemed to result in the issuance of a "senior security" within the meaning of Section 18(g) of the Act, (b) be prohibited by section 18(f)(1), and (c) violate the equal voting provisions of section 18(i).

2. Applicants contend that the proposed dual distribution system will relieve the holders of shares that have been outstanding for a certain period of time from most of the burden of distribution-related expenses.

3. Applicants assert that the requested relief does not present the concerns which section 18 was designed to address because the proposed arrangement does not involve borrowings, affect the Fund's assets or reserves, or increase the speculative character of the Fund's shares. Applicants also assert that the proposed capital structure will not induce any group of shareholders to invest in risky securities to the detriment of any other group of shareholders because the investment risks will be borne equally by all shareholders.

4. Applicants contend that mutuality of risk will be preserved with respect to both classes of shares because each class of the Fund will represent, on a per share basis, an equal, pro-rata interest in the same investment portfolio and will be subject to the same investment risk as the other class of shares of the Fund.

[3] Class A and Class B shares will have an identical net asset value. Except as provided below, distributions declared on one class of shares also will be declared on the other class of shares in order to maintain the identical net asset value. A distribution of .95% of the average daily net assets attributable to Class B shares will be declared solely on the Class B shares to offset the Additional Distribution Fee required to be paid by the Class A shares.

[4] See *supra* note 3.

[5] Shares purchased through distribution reinvestment paid in respect of Class A shares will be issued as Class B shares.

5. Applicants assert that investors will not be given misleading impressions as to the safety from risk of the Class A and Class B shares and the nature of Fund shares will not be rendered speculative by virtue of the existence of the two classes of shares because the shares will be redeemable at all times, neither class will have any liquidation preference over the other and neither class will be protected by any reserve or other account, and the characteristics of both classes will be fully described in Mackenzie's prospectuses.

6. Applicants state that Mackenzie's capital structure under the proposed arrangement will not enable insiders to manipulate Fund expenses and profits among the classes of shares because (a) neither Mackenzie nor the group of funds associated with the "Mackenzie" name is organized in a pyramid fashion, (b) all expenses and profits of the Fund, except the Additional Distribution Fee, will be allocated pro rata among all shares of the Fund irrespective of class, (c) the amount of the Additional Distribution Fee is fixed in advance by the Amended 12b–1 Plan and (d) all shareholders will have equal voting rights, except with respect to the Amended 12b–1 Plan.

7. Applicants argue that the proposed arrangement raises no valuation concerns. Moreover, Applicants will implement steps to ensure that the respective performance data of the Fund's classes are fairly disclosed in Mackenzie's prospectus and shareholder reports.

Conditions to Relief

If the requested relief is granted, Applicants agree to the following conditions:

1. Each class of shares will represent interests in the same portfolio of investments of the Fund and will be identical in all respects, except as set forth below. The only differences between classes of shares of the Fund will relate solely to: (a) Differences in policies with respect to the payment of distributions, the impact the disproportionate payments made under the 12b–1 distribution plan of the Fund and any incremental expenses subsequently identified that should be properly allocated to one class which shall be approved by the SEC pursuant to an amended order, (b) the conversion feature applicable only to the Class A shares, (c) the fact that the classes will vote separately with respect to the Fund's rule 12b–1 distribution plan, (d) the different exchange privileges of the classes of shares, and (e) the designation of each class of shares of the Fund.

2. The directors of the Fund, including a majority of the independent directors, will approve the dual distribution system. The minutes of the meetings of the directors of the Fund regarding the deliberations of the directors with respect to the approvals necessary to implement the dual distribution system will reflect in detail the reasons for the directors' determination that the proposed dual distribution system is in the best interests of both the Fund and its shareholders.

3. On an ongoing basis, the directors of the Fund pursuant to their fiduciary responsibilities under the Act and otherwise, will monitor the Fund for the existence of any material conflicts between the interests of the two classes of shares. The directors, including a majority of the independent directors, shall take such action as is reasonably necessary to eliminate any such conflicts that may develop. The Adviser and the Distributor will be responsible for reporting any potential or existing conflicts to the directors. If a conflict arises, the Adviser and the Distributor at their own cost will remedy such conflicts, up to and including establishing a new registered management investment company.

4. Any Rule 12b–1 Plan adopted or amended to permit the assessment of a rule 12b–1 fee on any class of shares which has not had its Rule 12b–1 Plan approved by the public shareholders of that class will be submitted to the public shareholders of such class for approval at the next meeting of shareholders after the initial issuance of the class of shares. Such meeting is to be held within 16 months of the date that the registration statement relating to such class first becomes effective or, if applicable, the date that the amendment to the registration statement necessary to offer such shares first becomes effective.

5. The shareholder Services Plan will be adopted and operated in accordance with the procedures set forth in rule 12b–1(b) through (f), except that shareholders will not enjoy the voting rights specified in rule 12b–1. In evaluating the shareholder Services Plan, the directors will specifically consider whether (a) the shareholder Services Plan is in the best interest of the applicable classes and their respective shareholders, (b) the services to be performed pursuant to the shareholder Services Plan are required for the operation of the applicable classes, (c) MIMI can provide services at least equal, in nature and quality, to those provided by others, including the Fund, providing similar services, and (d) the fees for such services are fair and reasonable in light of the usual and customary charges made by other entities, especially nonaffiliated entities, for services of the same nature and quality.

6. The directors of the Fund will receive quarterly and annual statements concerning distribution and shareholder servicing expenditures complying with paragraph (b)(3)(ii) of rule 12b–1, as it may be amended from time-to-time. In the statements, only expenditures properly attributable to the sale or servicing of a particular class of shares will be used to justify any distribution or servicing fee charged to that class. Expenditures not related to the sale or servicing of a particular class will not be presented to the directors to justify any fee attributable to that class. The statements, including the allocations upon which they are based, will be subject to the review and approval of the independent directors in the exercise of their fiduciary duties.

7. Dividends paid by the Fund with respect to each class of its shares, to the extent that dividends are paid, will be calculated in the same manner, at the same time, on the same day, and will be in the same amount, except for distributions of .95% made to the Class B shares, and except that the expenses of the Additional Distribution Fee of .95% payable in respect of the Class A shares will be borne exclusively by that class. Distribution payments relating to each respective class of shares will be borne exclusively by that class.

8. The methodology and procedures for calculating the net asset value and dividends and distributions of the two classes and the proper allocation of expenses between the two classes has been reviewed by an expert (the "Expert") who has rendered a report to the Fund, which has been provided to the staff of the SEC, that such methodology and procedures are adequate to ensure that such calculations and allocations will be made in an appropriate manner. On an ongoing basis, the Expert, or an appropriate substitute Expert, will monitor the manner in which the calculations and allocations are being made and, based upon such review, will render at least annually a report to the Fund that the calculations and allocations are being made properly. The reports of the Expert shall be filed as part of the periodic reports filed with the SEC pursuant to sections 30(a) and 30(b)(1) of the Act. The work papers of the Expert with respect to such reports, following request by the Fund (which the Fund agrees to provide), will be available for inspection by the SEC staff

upon the written request to the Fund for such work papers by a senior member of the Division of Investment Management, limited to the Director, an Associate Director, the Chief Accountant, the Chief Financial Analyst, an Assistant Director and any Regional Administrators or Associate and Assistant Administrators. The initial report of the Expert is a "Special Purpose" report on the "Design of a System" and the ongoing reports will be "Special Purpose" reports on the "Design of a System and Certain Compliance Tests" as defined and described in SAS No. 44 of the AICPA, as it may be amended from time-to-time, or in similar auditing standards as may be adopted by the AICPA from time-to-time.

9. The Applicants have adequate facilities in place to ensure implementation of the methodology and procedures for calculating the net asset value and distributions of the two classes of shares and the proper allocation of expenses between the two classes of shares and this representation will be concurred with by the Expert in the initial report referred to in condition 8 above and will be concurred with by the Expert, or an appropriate substitute Expert, on an ongoing basis at least annually in the ongoing reports referred to in condition 8 above. Applicants will take immediate corrective action if this representation is not concurred in by the Expert, or appropriate substitute Expert.

10. The conditions pursuant to which the exemptive order is granted and the duties and responsibilities of the directors of the Fund with respect to the dual distribution system will be set forth in guidelines which will be furnished to the directors.

11. The Fund will disclose arrangements, services, fees, sales loads, deferred sales loads, and exchange privileges applicable to each class of shares in every prospectus, regardless of whether all classes of shares are offered through each prospectus. The Fund will disclose the respective expenses and performance data applicable to all classes of shares in every shareholder report. To the extent any advertisement or sales literature describes the expenses or performance data applicable to any class of shares, it will also disclose the respective expenses and/or performance data applicable to all classes of shares. The information provided by Applicants for publication in any newspaper or similar listing of the Fund's net asset value and public offering price will present each class of shares separately.

12. The Applicants acknowledge that the grant of the exemptive order requested by the application will not imply SEC approval, authorization, or acquiescence in any particular level of payments that the Fund may make pursuant to the 12b-1 Plan or shareholder Services Plan in reliance on the exemptive order.

13. Class A shares will convert into Class B shares on the basis of the relative net asset values of the two classes, without the imposition of any sales load, fee or other charge.

For the Commission, by the Division of Investment Management, under delegated authority.

Margaret H. McFarland,

Deputy Secretary.

[FR Doc. 91-22559 Filed 9-18-91; 8:45 am]

BILLING CODE 8010-01-M

DEPARTMENT OF STATE

[Public Notice No. 1479]

Advisory Committee to the United States Section of the International Commission for the Conservation of Atlantic Tunas, Partially Closed Meeting

The Advisory Committee to the United States Section of the International Commission for the Conservation of Atlantic Tunas (ICCAT) will meet on October 3-4, 1991, 9:30 a.m., at the National Oceanic and Atmospheric Administration, National Marine Fisheries Service, SSMC1 Lobby Conference Room, 1335 East-West Highway, Silver Spring, Maryland.

The October 3 session will be open to the interested public. Discussion will include the U.S. domestic implementation of ICCAT recommendations; an overview of U.S. ICCAT scientific preparations; a report of the bluefin tuna fishery conducted in the U.S. and the Canadian zone and estimates of Japanese harvest of tunas, billfish, swordfish, and sharks in the Atlantic U.S. EEZ; and additional issues for 1991, i.e., CITES petition for listing bluefin tuna and the U.N. General Assembly resolution on driftnets and related matters. The Committee will continue in open session on October 4, at the same location, beginning at 9:30 a.m., if necessary.

The Advisory Committee will meet in closed session, October 4, at the same location. In the event the open session from the previous day continues to October 4, this closed session will commence at noon. Otherwise, this closed session will begin at 9:30 a.m. on October 4. This portion of the meeting will be closed to the public inasmuch as the discussions will involve classified matters pertaining to the negotiating position to be taken at the ICCAT annual meeting in November. The members of the Advisory Committee will examine various options for the U.S. negotiating position at the November meeting, and these considerations must necessarily involve a review of classified matters. Accordingly, the determination has been made to close this portion of the meeting pursuant to section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. app. I, section 10(d) and 5 U.S.C. 552b (c)(1) and (c)(9).

Requests for further information on the meeting should be directed to Mr. Brian S. Hallman, Deputy Director, Office of Fisheries Affairs (OES/OFA), room 5806, U.S. Department of State, Washington, D.C. 20520-7818. Mr. Hallman can be reached by telephone on (202) 647-2335 or by FAX on (202) 647-1106.

Dated: August 29, 1991.

R. Tucker Scully,

Acting Deputy Assistant Secretary, Oceans and Fisheries Affairs.

[FR Doc. 91-22596 Filed 9-18-91; 8:45 am]

BILLING CODE 4710-07-M

DEPARTMENT OF TRANSPORTATION

Coast Guard

Commercial Fishing Industry Vessel Advisory Committee; Working Group Meeting

AGENCY: Coast Guard, DOT.

ACTION: Notice of meeting.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Act (Pub. L. 92-463; 5 U.S.C. App. I), notice is hereby given of a meeting of the Working Group on Safety Standards for Unclassified Fish Processing Vessels. The meeting will be held on October 16, 1991, at the following address: North Pacific Fishing Vessel Owners Association, 1800 West Emerson Street, Fishermans Terminal, suite 101, Seattle, WA 98119. The meeting is scheduled to begin at 8:30 a.m. and end at 5 p.m. Attendance is open to the public.

TOPIC: Recommendations on Unclassified Fish Processing Vessel Safety: The working group will discuss the study conducted for the Coast Guard by the Worcester Polytechnic Institute (WPI) entitled Unclassified Fish Processing Vessel Study. The working group will then formulate a response on hull and machinery requirements to the full Commercial Fishing Industry Vessel Advisory Committee. These recommendations should take into

account, but not limited by, the WPI study.

FOR FURTHER INFORMATION CONTACT: LCDR Ed McCauley, Merchant Vessel Inspection and Documentation Division, Fishing Vessel/Offshore Activities Branch (G–MVI–4), room 1405, U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593-0001, (202) 267–2307.

Dated: September 13, 1991.

D.H. Whitten,

Acting Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 91–22612 Filed 9–18–91; 8:45 am]

BILLING CODE 4910–14–M

Commercial Fishing Industry Vessel Advisory Committee; Meeting

AGENCY: Coast Guard, DOT.

ACTION: Notice of meeting.

SUMMARY: Pursuant to section 10(a)(2) of the Federal Advisory Act (Pub. L. 92–463; 5 U.S.C. App. I), notice is hereby given of a meeting of the Commercial Fishing Industry Vessel Advisory Committee [CFIVAC]. The meeting will be held on November 4–5, 1991, in room 4234 at the Department of Transportation, 400 Seventh Street, SW, Washington DC. The meetings are scheduled to begin at 9 a.m. and end at 5 p.m. each day. Attendance is open to the public.

TOPIC: The Committee will discuss recommendations made by the Unclassified Fish Processor Vessel Working Group on hull and machinery standards for unclassified fish processors. The Committee will then make recommendations to the Coast Guard.

FOR FURTHER INFORMATION CONTACT: LCDR Ed McCauley, Merchant Vessel Inspection and Documentation Division, Fishing Vessel/Offshore Activities Branch (G–MVI–4), room 1405, U.S. Coast Guard Headquarters, 2100 Second Street, SW., Washington, DC 20593-0001, (202) 267–2307.

Dated: September 13, 1991.

D.H. Whitten,

Acting Chief, Office of Marine Safety, Security and Environmental Protection.

[FR Doc. 91–22613 Filed 9–18–91; 8:45 am]

BILLING CODE 4910–14–M

Federal Highway Administration

Environmental Impact Statement: Salt Lake County, UT

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Revised notice of intent.

SUMMARY: On January 16, 1990 the FHWA issued a notice to advise the public that an environmental impact statement (EIS) would be prepared for a proposed highway project in Salt Lake County, Utah. The FHWA is issuing this notice to advise the public that the status of the project was changed from an EIS to a Finding of No Significant Impact (FONSI). Through the process of preparing an environmental assessment document the study and analysis concluded that the preferred alternative has no significant environmental impacts.

FOR FURTHER INFORMATION CONTACT: Mr. Donald P. Steinke, U.S. Department of Transportation, Federal Highway Administration, 2520 West 4700 South, suite 9A, Salt Lake City, Utah 84118, Telephone (801) 524–5141; or R. James Naegle, Utah Department of Transportation, 4501 So. 2700 W., Salt Lake City, Utah 84119, Telephone (801) 965–4160; or Gene Sturzenegger, Utah Department of Transportation, 2060 So. 2400 W., Salt Lake City, Utah 84104, Telephone (801) 975–4801.

SUPPLEMENTARY INFORMATION: The FHWA, in cooperation with Utah Department of Transportation, has prepared an environmental assessment (EA) for the proposal to widen State Route 71 (700/900 East) from 9400 South to Fort Union Boulevard in Salt Lake County, Utah. A public hearing was held for this project on February 19, 1991. Prior to the public hearing a draft EA was available for public and agency review. The study and analysis concluded that the preferred alternative has no significant environmental impacts.

(Catalog of Federal Domestic Assistance Program Number 20.205, Highway Planning and Construction. The regulations implementing Executive Order 12372 regarding intergovernmental consultation on Federal programs and activities apply to this program.)

Issued on: September 9, 1991.

Donald P. Steinke,

Division Administrator, Salt Lake City, Utah.

[FR Doc. 91–22521 Filed 9–18–91; 8:45 am]

BILLING CODE 4910–22–M

Intelligent Vehicle-Highway Society of America; Public Meeting

AGENCY: Federal Highway Administration (FHWA), DOT.

ACTION: Notice of public meeting.

SUMMARY: The Intelligent Vehicle-Highway Society of America (IVHS-America) will hold meetings of its Executive Committee, Coordinating Council, and the Strategic Planning Subcommittee of the Coordinating Council on October 1 through October 4, 1991. The IVHS-America provides a forum for national discussion and recommendations on IVHS activities including programs, research needs, strategic planning, standards, international liaison, and priorities. The charter for the utilization of IVHS-America as an advisory committee establishes the Executive Committee and the Coordinating Council of IVHS-America as an advisory committee under the Federal Advisory Committee Act (FACA) when they provide advice or recommendations to DOT officials on IVHS policies and programs (56 FR 9400, March 6, 1991).

DATES: The Strategic Planning Subcommittee of the Coordinating Council will meet on October 1, 1991, from 1 p.m. to 6 p.m., e.t., and on October 2, 1991, from 8:30 a.m. to 5 p.m., e.t. The sessions are expected to focus on: (1) A report from the principal staff drafting a IVHS strategic plan, and (2) A review and discussion of a first draft of the IVHS strategic plan. The Coordinating Council will meet on October 3, 1991, from 9 a.m. to 4:30 p.m., e.t., and on October 4, 1991, from 9 a.m. to 11:45 a.m., e.t. The sessions are expected to focus on: (1) A discussion of the status and activities related to the strategic plan; (2) Technical Committee status reports; and (3) the technical program of the 1992 IVHS-America annual meeting. The Executive Committee will meet on October 4, 1991, from 1:30 p.m. to 4 p.m., e.t. The session is expected to focus on (1) The 1992 annual meeting status; (2) A strategic plan briefing; (3) Proposed changes to the By-Laws; (4) Status of the National Information Clearinghouse; and (5) IVHS-America business matters.

ADDRESSES: Holiday Inn Crowne Plaza Hotel; 300 Army Navy Drive; Arlington (Crystal City), Virginia 22202. The meetings are scheduled to be held in the following rooms: Strategic Planning Subcommittee of the Coordinating Council—Arlington South Room; Coordinating Council—Jackson Room, and Executive Committee Parlor A–C.

FOR FURTHER INFORMATION CONTACT: Mr. Lyle Saxton, FHWA, HTV–10, room 3100, 400 Seventh Street, SW., Washington, DC 20590, (202) 366–2197, office hours are from 7:30 a.m. to 4 p.m. e.t., Monday through Friday, except for legal holidays; or Dr. James Constantino, IVHS-America, 1776 Massachusetts Avenue, NW., Fifth Floor, Washington, DC 20036, (202) 857–1242.

SUPPLEMENTARY INFORMATION: All the sessions are open to the public without charge under the provisions of the FACA. The meetings on October 2 through 4 include lunch for the IVHS America members No advisory committee official business will be conducted at the luncheons

(23 U.S.C 315, 49 CFR 1.48)

Issue on September 10, 1991

T. D. Larson,

Administrator

[FR Doc 91-22574 Filed 9-18-19; 8:45 am]

BILLING CODE 4910-22-M

National Highway Traffic Safety Administration

Denial of Motor Vehicle Defect Petition

This notice sets forth the reasons for the denial of a petition submitted to NHTSA under section 124 of the National Traffic and Motor Vehicle Safety Act of 1966, as amended (15 U.S.C. 1381 *et seq.*).

Mr. and Mrs. Tim Barnes submitted a petition dated April 5, 1991, requesting NHTSA to open a defect investigation into the braking system of 1988 Chrysler Medallion vehicles. They cite difficulties they have experienced with their vehicle, specifically, they claim excessive "* * * brake problems requiring brake repair or replacement * * *."

In assessing the merits of the petition, NHTSA reviewed actions taken by Chrysler concerning the Medallion, as well as agency data and information on brake performance in these vehicles.

Available records indicate that Chrysler took the following actions concerning brake systems on the 1988 Medallion: (1) A Newsletter (JE-10-88) on March 14, 1988, to dealers to aid in diagnosing brake noise; (2) a Newsletter (JE42-88) to dealers advising of a new front brake pad available for the vehicle; (3) a Technical Service Bulletin (P-4526) concerning repairs for a broken front brake pad wear sensor warning light wire; (4) a Technical Service Bulletin (P-1770) concerning corrections for rear brake noise; and (5) a Recall Notification (JE88-01-8805) in March 1988, concerning replacement of front brake pads to correct a brake noise condition.

A review of agency data files, including information reported to the Auto Safety Hotline by consumers, indicated that there were insufficient reports of brake failure, failure of the brake wear warning light, or reduced safety performance to indicate a safety defect trend was established or likely to be established. The agency does have reports of excessive brake wear and the need for frequent replacement of brake pads and brake shoes in these vehicles However the brake wear described in these reports is not likely to cause sudden brake failure, and it appears that consumers will be alerted to any developing problem before it creates an adverse safety impact

The information available to the agency does indicate that the brake system in these vehicles has required substantial and frequent maintenance. However, this does not in and of itself demonstrate the existence of a defect posing a threat to motor vehicle safety. In this instance, any degradation in brake performance would most likely be gradual, and the driver would be warned of the problem by increased brake noise. Under this circumstance, there would not appear to be an unreasonable risk to motor vehicle safety.

In consideration of the available information, we have concluded that there is not a reasonable possibility that an order concerning the notification and remedy of a safety-related defect in relation to the petitioner's allegations would be issued at the conclusion of an investigation. Under the circumstances, further commitment of agency resources does not appear to be warranted at this time. Therefore, the petition is denied.

Authority: Sec. 124, Pub. L. 93-492; 88 Stat. 1470 (15 U.S.C. 1410a); delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: September 12, 1991.

William A. Boehly,

Associate Administrator for Enforcement.

[FR Doc. 91-22608 Filed 9-18-91; 8:45 am]

BILLING CODE 4910-59-M

Denial of Motor Vehicle Defect Petition

This notice sets forth the reasons for the denial of a petition submitted to NHTSA under section 124 of the National Traffic and Motor Vehicle Safety Act of 1966, as amended (15 U.S.C. 1381 *et seq.*).

Mr. Benjamin Kelley of Institute for Injury Reduction submitted a petition dated June 25, 1991, requesting, inter alia, that the agency open a defect investigation to determine which automatic safety belts are defective. Specifically, the petitioner requests NHTSA to "[d]etermine which automatic belt designs, if any, are defective within the meaning [of] the [National Traffic and Motor Vehicle Safety] Act and should be recalled for correction by manufacturers, and move to achieve such recalls."

NHTSA is denying the petition. The agency has concluded that there is no reasonable possibility that the action sought by the petitioner would lead to a determination of the existence of a safety related defect and that it would be inappropriate to expend further agency resources on this matter This is based on the following:

(1) The agency has conducted a number of analyses concerning the injury-reducing effectiveness of various types of automatic crash protection systems. For example, a comprehensive Regulatory Impact Analysis (RIA) was conducted by the agency in 1984 to support the decision to require automatic crash protection in all new passenger cars. Further, the agency published a similar document in 1991 to support the same regulatory requirement for light trucks and vans. That analysis, and others conducted by the agency, have concluded that all automatic crash protection systems, including automatic safety belt systems, would be effective in preventing death and injury in motor vehicle crashes. In both rulemaking proceedings, the agency noted that various automatic safety belt designs could differ in terms of their injury-reducing effectiveness. The agency is currently analyzing all types of automatic restraint systems to determine their effectiveness in real world crashes. This analysis will assist the agency in determining whether any regulatory action is warranted. However, there are no data available to suggest the existence of a safety-related defect in any automatic belt design.

(2) The petitioner presents no new evidence that any automatic safety belt systems are inherently defective.

(3) In agency compliance testing, all automatic safety belt system designs have met applicable Federal Motor Vehicle Safety Standards. This indicates that all automatic belt designs are providing the minimum level of safety performance required by the standards.

(4) NHTSA's Office of Defects Investigation (ODI) is currently investigating alleged safety-related defects concerning the automatic safety belt systems in certain vehicles. These investigations are not directed at the inherent features of automatic safety belt designs, but rather focus on whether there is an identifiable defect in the safety belt design in a specific make or model. The agency will continue to study and analyze data to determine whether defect investigations should be opened on other automatic safety belt systems.

For the reasons above the agency has decided to deny the petition.

Authority: Sec. 124, Pub. L. 93–492; 88 Stat. 1470 (15 U.S.C. 1410a); delegations of authority at 49 CFR 1.50 and 501.8.

Issued on: September 13, 1991.

William A. Boehly,

Associate Administrator for Enforcement.

[FR Doc. 91–22607 Filed 9–18–91; 8:45 am]

BILLING CODE 4910–59–M

[Docket No. 91–44–IP–NO. 1]

Thomas Built Buses, Inc.; Receipt of Petition for Determination of Inconsequential Noncompliance

Thomas Built Buses, Inc. (Thomas Built) of High Point, North Carolina has petitioned to be exempted from the notification and remedy requirements of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1381 *et seq.*) for an apparent noncompliance with 49 CFR 571.208, Federal Motor Vehicle Safety Standard No. 208. "Occupant Crash Protection," on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety.

This notice of receipt of a petition is published under section 157 of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1417) and does not represent any agency decision or other exercise of judgment concerning the merits of the petition.

Paragraph S7.2 of Standard No. 208 specifies that a seat belt assembly installed in any vehicle, except an automatic belt assembly, shall have a latch mechanism that releases at a single point by a pushbutton action.

Thomas Built produced 29 type A school buses (under 10,000 pounds GVWR) between September 1990 and October 1990 which do not comply with the above mentioned requirements. The seat belts do not have a pushbutton release. Instead they have a lift lever release. Thomas Built supports its petition for inconsequential noncompliance with the following:

> The seat belts installed in these units, although not of the push button release type, meet all other applicable FMVSS requirements.
>
> On the units involved, the seat belts have the same type of release throughout the bus. There was no mixing of push button and lift lever belts.
>
> This type of release (lift lever) has been used on seat belts in school buses for years and the lack of the push button release on a few buses built one month after the required date will have no detectable impact on belt usage or passenger familiarity with the new release.

Interested persons are invited to submit written data, views and arguments on the petition of Thomas Built, described above. Comments should refer to the Docket Number and be submitted to: Docket Section, National Highway Traffic Safety Administration, room 5109, 400 Seventh Street, SW., Washington, DC, 20590. It is requested but not required that six copies be submitted.

All comments received before the close of business on the closing date indicated below will be considered. The application and supporting materials, and all comments received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, the Notice will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: October 21, 1991.

Authority: 15 U.S.C. 1417; delegation of authority at 49 CFR 1.50 and 49 CFR 501.8.

Issued on September 16, 1991.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 91–22605 Filed 9–18–91; 8:45 am]

BILLING CODE 4910–59–M

[Docket No. 91–45–IP–NO. 1]

Thomas Built Buses, Inc.; Receipt of Petition for Determination of Inconsequential Noncompliance

Thomas Built Buses, Inc. (Thomas Built) of High Point, North Carolina has petitioned to be exempted from the notification and remedy requirements of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1381 *et seq.*) for an apparent noncompliance with 49 CFR 571.205, Federal Motor Vehicle Safety Standard No. 205, "Glazing Materials," on the basis that this noncompliance is inconsequential as it relates to motor vehicle safety.

This notice of receipt of a petition is published under Section 157 of the National Traffic and Motor Vehicle Safety Act (15 U.S.C. 1417) and does not represent any agency decision or other exercise of judgement concerning the merits of the petition.

Paragraph S6.2 of Standard No. 205 specifies that a number of designating the material used and the symbol "DOT" shall be marked on all glazing materials by the prime glazing material manufacturer.

Between February 1980 and April 1991, Thomas Built produced 2,763 buses and school buses, both over and under 10,000 pounds GVWR (for 16 to 72 passengers) which do not comply with the above mentioned requirements of Standard No. 205. The material designation and the symbol "DOT" is not market on the wire reinforced glass installed in the lower portion of the rear emergency door. Thomas Built supports its petition for inconsequential noncompliance with the following:

> Although the glass did not have the DOT mark it meets all of the requirements of FMVSS 205 and ANSI Z26.1. A test report (#506406) from an independent testing facility is included with this letter.
>
> This wire reinforced glass was installed only in the lower portion of the rear emergency door which is in accordance with both FMVSS 205 and ANSI Z26.1

Interested persons are invited to submit written data, views and arguments on the petition of Thomas Built, described above. Comments should refer to the Docket Number and be submitted to: Docket Section, National Highway Traffic Safety Administration, room 5109, 400 Seventh Street, SW., Washington, DC, 20590. It is requested but not required that six copies be submitted.

All comments received before the close of business on the closing date indicated below will be considered. The application and supporting materials, and all comments received after the closing date will also be filed and will be considered to the extent possible. When the petition is granted or denied, the Notice will be published in the **Federal Register** pursuant to the authority indicated below.

Comment closing date: October 21, 1991.

Authority: 15 U.S.C. 1417; delegation of authority at 49 CFR 1.50 and 49 CFR 501.8.

Issued on September 16, 1991.

Barry Felrice,

Associate Administrator for Rulemaking.

[FR Doc. 91–22606 Filed 9–18–91; 8:45 am]

BILLING CODE 4910–59–M

DEPARTMENT OF THE TREASURY

Public Information Collection Requirements Submitted to OMB for Review

Dated: September 13, 1991.

The Department of Treasury has submitted the following public information collection requirement(s) to OMB for review and clearance under the Paperwork Reduction Act of 1980, Public Law 96–511. Copies of the submission(s) may be obtained by calling the Treasury Bureau Clearance Officer listed. Comments regarding this information collection should be addressed to the OMB reviewer listed and to the Treasury Department Clearance Officer, Department of the Treasury, room 3171 Treasury Annex

1500 Pennsylvania Avenue, NW,
Washington, DC 20220

Internal Revenue Service

OMB Number: 1545–0495.

Form Number: IRS Form 4506–A.

Type of Review: Extension.

Title: Request for Public Inspection or Copy of Exempt Organization Tax Form.

Description: Form 4506–A is used to request a public inspection or a copy of an exempt organization tax form. It is also used to request an aperture card of Form 990–PF.

Respondents Individuals or households, State or local governments, Farms, Businesses or other for profit, Federal agencies or employees, Non profit institutions.

Estimated Number of Respondents/Recordkeepers: 20,000.

Estimated Burden Hours Per Respondent/Recordkeeper:

Recordkeeping—7 minutes
Learning about the law or the form—2 minutes
Preparing the form—17 minutes
Copying, assembling, and sending the form to IRS—14 minutes

Frequency of Response. On occasion

Estimated Total Reporting Recordkeeping Burden. 13,200 hours

Clearance Officer: Garrick Shear (202) 535–4297, Internal Revenue Service, room 5571, 1111 Constitution Avenue, NW., Washington, DC 20224.

OMB Reviewer: Milo Sunderhauf (202) 395–6880, Office of Management and Budget, room 3001, New Executive Office Building, Washington, DC 20503.

Lois K. Holland,

Departmental Reports Management Officer

[FR Doc. 91–22578 Filed 9–18–91, 8:45 am]

BILLING CODE 4830–01–M

Sunshine Act Meetings

Federal Register
Vol. 56, No. 182
Thursday, September 19, 1991

This section of the FEDERAL REGISTER contains notices of meetings published under the "Government in the Sunshine Act" (Pub. L. 94-409) 5 U.S.C. 552b(e)(3).

COMMODITY FUTURES TRADING COMMISSION

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11:00 a.m., Friday, October 4, 1991.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Surveillance Matters

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 91–22760 Filed 9–17–91; 3:08 pm]

BILLING CODE 6351-01-M

COMMODITY FUTURES TRADING COMMISSION

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11:00 a.m., Friday, October 11, 1991.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Surveillance Matters

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 91–22761 Filed 9–17–91; 3:08 pm]

BILLING CODE 6351-01-M

COMMODITY FUTURES TRADING COMMISSION

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11:00 a.m., Friday, October 18, 1991.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Surveillance Matters

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 91–22762 Filed 9–17–91; 3:08 p.m.]

BILLING CODE 6351-01-M

COMMODITY FUTURES TRADING COMMISSION

AGENCY HOLDING THE MEETING: Commodity Futures Trading Commission.

TIME AND DATE: 11:00 A.M., Friday, October 25, 1991.

PLACE: 2033 K St., NW., Washington, DC, 8th Floor Hearing Room.

STATUS: Closed.

MATTERS TO BE CONSIDERED:

Surveillance Matters

CONTACT PERSON FOR MORE INFORMATION: Jean A. Webb, 254–6314.

Jean A. Webb,

Secretary of the Commission.

[FR Doc. 91–22763 Filed 9–17–91; 3:08 pm]

BILLING CODE 6351-01-M

FEDERAL ELECTION COMMISSION

AGENCY: Federal Election Commission.

* * * * *

DATE AND TIME: Thursday, September 26, 1991, 10:00 a.m.

PLACE: 999 E Street, NW., Washington, DC (ninth floor).

STATUS: This meeting will be open to the public.

ITEMS TO BE DISCUSSED:

Final Audit Report on the Paul Simon for President Committee
Advisory Opinion 1991–26: Mr. Jan Witold Baran on behalf of the Versatel Corporation of Santa Clara, California.
Advisory Opinion 1991–28: Ms. Megan L. Garrett on behalf of the Golden Rule Financial Corporation ("Golden Rule") and the Golden Rule Financial Corporation Political Action Committee ("Golden Rule PAC")
Status of Presidential Audits
Administrative Matters

* * * * *

DATE AND TIME: Thursday, September 26, 1991, to be convened after the open meeting.

PLACE: 999 E Street, NW., Washington, DC.

STATUS: This meeting will be closed to the public.

ITEMS TO BE DISCUSSED:

Compliance matters pursuant to 2 U.S.C. § 437g.
Audits conducted pursuant to 2 U.S.C. § 437g, § 438(b), and Title 26, U.S.C.

* * * * *

Matters concerning participation in civil actions or proceedings or arbitration.
Internal personnel rules and procedures or matters affecting a particular employee.

* * * * *

PERSON TO CONTACT FOR INFORMATION: Mr. Fred Eiland, Press Officer, Telephone: (202) 376–3155.

Marjorie W. Emmons,

Secretary of the Commission.

[FR Doc. 91–22765 Filed 9–17–91; 3:21 pm]

BILLING CODE 6715-01-M

RESOLUTION TRUST CORPORATION

Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 2:18 p.m. on Tuesday, September 10, 1991, the Board of Directors of the Resolution Trust Corporation met in closed session to consider matters relating to: (1) The resolution of failed thrift institutions; (2) a statement of policy providing for confidential treatment of proprietary information obtained in connection with RTC's renegotiation efforts; (3) implementing a policy on the release to the public of certain asset-related information; (4) expanding the Corporate Information System (CIS); (5) a lease for relocating the Coastal Consolidated Office, Costa Mesa, California; (6) the sale of assets; and (7) assistance to minority-owned institutions.

In calling the meeting, the Board determined, on motion of Director C.C. Hope, Jr. (Appointive), and seconded by Stephen R. Steinbrink, acting in the place and stead of Director Robert L. Clarke (Comptroller of the Currency), and concurred in by Chairman L. William Seidman, Vice Chairman Andrew C. Hove, Jr., and Jonathan L. Fiechter, acting in the place and stead of Director T. Timothy Ryan, Jr. (Director of the Office of Thrift Supervision), that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be

considered in a closed meeting by authority of subsections (c)(4), (c)(8), (c)(9)(A)(ii), (c)(9)(B), and (c)(10) of the "Government in the Sunshine Act" (5 U.S.C. 552b).

The meeting was held in the Board Room of the Federal Deposit Insurance Corporation Building located at 550—17th Street, NW., Washington, DC.

Dated: September 13, 1991.

Resolution Trust Corporation.

John M. Buckley, Jr.,

Executive Secretary.

[FR Doc. 91-22685 Filed 9-16-91; 4:44 pm]

BILLING CODE 6714-01-M

RESOLUTION TRUST CORPORATION

Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that at 3:10 p.m. on Tuesday, September 10, 1991, the Board of Directors of the Resolution Trust Corporation and Federal Deposit Insurance Corporation met in closed session to consider matters relating to the separation of RTC functions from the FDIC.

In calling the meeting, the Board determined, on motion of Director C.C. Hope, Jr. (Appointive), and seconded by Vice Chairman Andrew C. Hove, Jr., and concurred in by Chairman L. William Seidman, Stephen R. Steinbrink, acting in the place and stead of Director Robert L. Clarke (Controller of the Currency), and Jonathan L. Fiechter, acting in the place and stead of Director T. Timothy Ryan, Jr. (Director of the Office of Thrift Supervision), that Corporation business required its consideration of the matters on less than seven days' notice to the public; that no earlier notice of the meeting was practicable; that the public interest did not require consideration of the matters in a meeting open to public observation; and that the matters could be considered in a closed meeting by authority of subsection (c)(2) of the "Government in the Sunshine Act" (5 U.S.C. 552b).

The meeting was held in the Board Room of the Federal Deposit Insurance Corporation Building located at 550–17th Street, NW., Washington, DC.

Dated: September 13, 1991.

Resolution Trust Corporation.

John M. Buckley, Jr.,

Executive Secretary.

[FR Doc. 91-22686 Filed 9-16-91; 4:44 pm]

BILLING CODE 6714-01-M

RESOLUTION TRUST CORPORATION

Notice of Changes in Subject Matter of Agency Meeting

Pursuant to the provisions of the "Government in the Sunshine Act" (5 U.S.C. 552b), notice is hereby given that the following changes were made to the open agenda of the Resolution Trust Corporation Board of Directors meeting, Tuesday, September 10, 1991, in the Board Room on the sixth floor of the FDIC Building located at 550—17th Street, NW., Washington, DC:

The following subjects were withdrawn from the agenda:

Memorandum re: Proposed Statement of Policy Providing for Confidential Treatment of Proprietary Information Obtained in Connection with RTC's Renegotiation Efforts.

The following subjects were added to the Summary agenda:

Memorandum re: The authority to execute agreements with the Internal Revenue Service concerning consolidated income tax refunds.

Memorandum re: Delegations to centralize management and sale of all conservatorship and receivership securities and related capital markets instruments with the Capital Markets Branch in the Washington office.

The following subject was added to the Discussion agenda:

Memorandum re: The revised Policy Statement on Marketing Asset Portfolios.

The following subject was moved to the Summary agenda:

Memorandum re: Master Resolution for Mortgage Securitization Transactions.

Requests for further information concerning the meeting may be directed to Mr. John M. Buckley, Jr., Executive Secretary of the Corporation, at 202–416–7282.

Dated: September 13, 1991.

Resolution Trust Corporation.

John M. Buckley, Jr.,

Executive Secretary.

[FR Doc. 91-22687 Filed 9-16-91; 4:44 pm]

BILLING CODE 6714-01-M

UNITED STATES INSTITUTE OF PEACE

Notice of Meeting

AGENCY: United States Institute of Peace.

DATE: September 26, 27, 1991.

TIME: 9:00 a.m. to 5:30 p.m.

LOCATION: 1550 M Street, NW. (ground floor conference room), Washington, DC.

STATUS: (Open session)—Portions may be closed pursuant to subsection (c) of section 552(b) of title 5, United States Code, as provided in subsection 1706(h)(3) of the United States Institute of Peace Act, Public Law. (98–525).

AGENDA: (Tentative)—Consideration of the minutes of the forth-eighth meeting of the Board of Directors; Chairman's Report; President's Report; Annual Program Review; Board Committee Reports.

CONTACT: Mr. Gregory McCarthy, Director, Public Affairs and Information, Telephone: 202/457–1700.

DATED: September 17, 1991.

Ms. Bernice J. Carney,

Director, Office of Administration, United States Institute of Peace.

[FR Doc. 91-22730 Filed 9-17-91; 2:31 pm]

BILLING CODE 3155-01-M

federal register

Thursday
September 19, 1991

Part II

Department of the Treasury

Internal Revenue Service

26 CFR Part 1

Nondiscrimination Requirements for Qualified Plans; Final Regulations

DEPARTMENT OF THE TREASURY

Internal Revenue Service

26 CFR Part 1

[T.D. 8360]

RIN 1545-AM95

Nondiscrimination Requirements for Qualified Plans

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations under section 401(a)(4) of the Internal Revenue Code of 1986. They interpret the section 401(a)(4) requirement that contributions or benefits provided under a tax-qualified retirement plan not discriminate in favor of highly compensated employees. This section and the minimum coverage requirements of section 410(b) form a coordinated nondiscrimination rule that prohibits a tax-qualified retirement plan from being designed or operated to favor highly compensated employees.

These final regulations reflect changes made by the Tax Reform Act of 1986 and by the Technical and Miscellaneous Revenue Act of 1988. The regulations provide the guidance necessary to comply with the law and affect sponsors of, and participants in, tax-qualified retirement plans. These final regulations are issued in conjunction with other sets of final regulations under sections 401(a)(17), 401(l), 410(b), and 414(s), and were developed in conjunction with final regulations under section 401(a)(26) that will be published in the near future.

EFFECTIVE DATES: These regulations are effective for plan years beginning after December 31, 1991, and applied to those plan years except as set forth in the transition rules of § 1.401(a)(4)-13.

FOR FURTHER INFORMATION CONTACT: The attorney listed below for the particular section at 202-377-9372 (not a toll-free number).

§ 1.401-4 Rebecca Wilson or David Munroe
§ 1.401(a)-4 Rebecca Wilson or David Munroe
§ 1.401(a)(4)-1 Rebecca Wilson or David Munroe
§ 1.401(a)(4)-2 Rebecca Wilson or David Munroe
§ 1.401(a)(4)-3 Marjorie Hoffman or David Munroe
§ 1.401(a)(4)-4 Suzanne Tank or David Munroe
§ 1.401(a)(4)-5 Rebecca Wilson or David Munroe
§ 1.401(a)(4)-6 David Munroe
§ 1.401(a)(4)-7 Patricia McDermott
§ 1.401(a)(4)-8 Marjorie Hoffman or David Munroe
§ 1.401(a)(4)-9 David Munroe
§ 1.401(a)(4)-10 Rebecca Wilson or David Munroe
§ 1.401(a)(4)-11 Rebecca Wilson or David Munroe
§ 1.401(a)(4)-12 Rebecca Wilson or David Munroe
§ 1.401(a)(4)-13 Patricia McDermott or David Munroe
§ 411(d)-4 Patricia McDermott or David Munroe

SUPPLEMENTARY INFORMATION: On May 14, 1990, the Internal Revenue Service published in the **Federal Register** proposed amendments to the Income Tax Regulations (26 CFR part 1) under section 401(a)(4) of the Internal Revenue Code of 1986 (Code) (55 FR 19897). These regulations were proposed in conjunction with regulations under related Internal Revenue Code sections including sections 401(a)(17), 401(a)(26), 410(b), and 414(s) and amendments to regulations under section 401(l). The May 1990 proposed regulations were supplemented and modified by proposed regulations published in the **Federal Register** on September 14, 1990 (55 FR 37888), and December 3, 1990 (55 FR 49906).

Written comments were received from the public on the proposed regulations. In addition, a public hearing on the May 14, 1990 regulations was announced on May 14, 1990 (55 FR 19897), and a public hearing on the September 14, 1990, regulations was announced on September 14, 1990 (55 FR 37888). These public hearings were held on September 26, 27, and 28, 1990. After consideration of all of the written comments received and the statements made at the public hearing, the proposed regulations under section 401(a)(4) are adopted as modified by this Treasury Decision.

Explanation of Provisions: Development of Final Regulations and Coordination With Other Regulations

These regulations were developed in conjunction with regulations under the various related statutory nondiscrimination provisions governing tax-qualified retirement plans. Together, these regulations provide comprehensive guidance on those provisions. These related sections are principally sections 401(a)(17), 401(a)(26), 401(l), 410(b), and 414(s). This coordinated approach was initially adopted in developing the proposed regulations and is intended to provide taxpayers with an integrated framework for applying the nondiscrimination provisions of the Code. In addition, this approach made it possible to simplify many of the related nondiscrimination rules. For example, the May 1990 proposed regulations on the minimum participation rules of section 401(a)(26) substantially simplified the regulations previously proposed under that section. Similarly, the May 1990 proposed regulations simplified the early termination restrictions contained in existing final regulations under section 401(a)(4) and simplified previously published proposed regulations under the permitted disparity rules of section 401(l), the minimum coverage rules of section 410(b), and the definition of compensation under section 414(s). Retention of this coordinated approach in these final regulations has made possible both the retention and some expansion of these previously proposed simplifications.

Summary of Significant Modifications

The proposed regulations provided the first comprehensive guidance for determining whether a plan meets the nondiscrimination requirements of section 401(a)(4). Because the proposed regulations contained comprehensive and objective standards, they generated a significant number of comments. Among other requests, commentators asked for revisions to the testing rules, additional testing alternatives, and clarification of ambiguities. In addition, comments suggested areas in which the regulations under other Code sections might be better coordinated with the requirements of section 401(a)(4).

In general, these final regulations retain the structure of the proposed regulations. In response to comments, however, the final regulations make a number of revisions to the proposed regulations. Substantive changes have been made in response to comments about specific aspects of the testing process. Other changes simplify and clarify the proposed regulations.

The following is a brief summary of the more significant substantive modifications in the final regulations.

- New safe harbors are provided for cash balance plans and section 412(i) insurance contract plans.
- Provisions have been added to accommodate common plan designs in situations where employees transfer between plans of the same employer or transfer from one employer to another in connection with a merger or acquisition. In particular, these provisions include expanded access to safe harbors for plans that offset benefits with benefits provided under another plan of the employer or former employer.
- The general test for determining whether a plan discriminates with respect to the amount of contributions or

benefits has been simplified by automatically incorporating a substantially more flexible rate segment restructuring methods; and the requirement that the employee groups that are the basis for restructuring have some common attributes other than accrual or allocation rates has been eliminated.

- A retroactive correction mechanism is provided, permitting employers to make certain retroactive amendments in order to insure compliance with nondiscrimination rules at any point up to the 15th day of the 10th month after the end of the plan year.
- Provisions on taking compensation into account for purposes of nondiscriminatory amounts testing in both the safe harbors and the general test are clarified. In addition, for purposes of the safe harbors, options are provided under which an employer can disregard compensation earned by employees in years of termination and years in which employees work under 1000 hours in determining average annual compensation.
- The general test has been revised to permit employes to take certain social security supplements into account for purposes of nondiscrimination testing under section 401(a)(4) and for purposes of satisfying the section 401(l) permitted disparity rules.
- The provisions permitting satisfaction of the general test solely on the basis of the most valuable accrual rates have been revised to eliminate the requirement for uniformity in the normal retirement benefit but to require general uniformity in the conversion to subsidized benefits.
- The annual method for determining accrual rates has been revised to take into account all accruals during the plan year, including accruals reflecting increases in prior benefits due to current increases in compensation and increases resulting from grants of past service credit. Under the transition rules, increases in benefits due to the effect of increases in compensation on benefit formulas in effect prior to the first plan year beginning on or after January 1, 1992, with respect to accruals prior to that date, are generally disregarded.
- New transition rules for safe harbors and the option to apply the accrued-to-date and projected method to benefits after a date selected by the employer have been clarified and the existing rules have been expanded. The fresh-start and transition rules have been extended to apply to years after the effective date as well as TRA '86 transition years. In addition, a single set of fresh-start rules now cover transitions to the safe harbors and the option to apply the accrued-to-date and projected methods to benefits accrued after a date selected by the employer. Special fresh-start options are provided for plans with employees with compensation limited by section 401(a)(17) under both the accrued-to-date and projected methods.
- The nondiscrimination rules applicable to plan amendments and grants of past service have been consolidated, the relevant facts-and-circumstances tests has been clarified, and the more flexible significant discrimination standard, previously applicable only to grants of past service has been broadened to cover plan amendments as well.
- The special merger and acquisition rule for benefits, rights, and features has been expanded to cover employees hired during the transition period in section 410(b)(6)(C), and a new permissive aggregation rule has been provided for purposes of satisfying the current and effective availability requirements applicable to benefits, rights, and features under a plan.
- Step-by-step guidance has been provided for the actuarial calculations needed to determine accrual rates for those employers applying the general test.
- Additional examples have been provided throughout the regulations.

The specific amendments to the proposed regulations are discussed in detail below as part of the discussion of the section to which they relate.

Overview of the Section 401(a)(4) Nondiscrimination Rules

Section 401(a)(4) provides generally that a plan is a qualified plan only if the contributions or the benefits under the plan do not discriminate in favor of highly compensated employees. The rules provided in the final regulations are the exclusive rules for determining whether this requirement is met. A plan, therefore, will satisfy section 401(a)(4) only if it complies both in form and in operation with the rules in these regulations.

Section 1.401(a)(4)–1 of the regulations sets forth the three requirements a plan must meet to satisfy section 401(a)(4) and provides rules on how these requirements are applied. As in the proposed regulations, the final regulations contain a rule in § 1.401(a)(4)–1(c)(6) which provides that most collectively bargained plans (including governmental collectively bargained plans) automatically satisfy the requirements of section 401(a)(4).

The first general requirement under section 401(a)(4) is that either the contributions or the benefits provided under a plan must be nondiscriminatory in amount. As provided in the proposed regulations, a plan generally is permitted under the final regulations to satisfy this requirement on the basis of either contributions or benefits, regardless of whether the plan is a defined contribution plan or a defined benefit plan. Thus, a plan is not required to establish nondiscrimination in amount with respect to both the contributions and the benefits provided.

The second general requirement is that the benefits, rights, and features provided under the plan must be made available to employees in the plan in a nondiscriminatory manner. The benefits, rights, and features subject to this requirement are the optional forms of benefit (such as retirement annuities and single sum payments), ancillary benefits (such as disability benefits), and other rights and features (such as plan loans and investment options) available to employees under the plan.

The third general requirements is that the effect of plan amendments (including grants of past service credit) and plan terminations must be nondiscriminatory.

1. Nondiscrimination in Amount of Contributions or Benefits

Overview

The final regulations, like the proposed regulations, provide several testing alternatives for demonstrating compliance with the requirement that either the contributions or the benefits provided under a plan be nondiscriminatory in amount. Specifically, the regulations provide a number of design-based and simplified testing safe harbors. The regulations also provide general testing rules for plans that do not satisfy the safe harbor requirements.

In general, commentators approved strongly of the existence of the safe harbors. Commentators also requested additional safe harbors, expansion and clarification of existing safe harbors, and broader transition rules to facilitate amending non-safe harbor plans to comply with the safe harbor requirements. With respect to the general testing rule, many commentators suggested revisions intended to clarify and simplify the testing process, and requested additional guidance as to the manner in which certain aspects of the test were to be performed. As discussed in more detail below, these final regulations reflect amendments addressing these comments on both the safe harbor and general testing issues.

The general approach to nondiscriminatory amounts testing in

the final regulations is the same as under the proposed regulations. A defined contribution plan generally will satisfy the nondiscriminatory amount requirement by showing that the contributions provided under the plan are nondiscriminatory in amount under § 1.401(a)(4)-2. Except in the case of an employee stock ownership plan (ESOP), or a section 401(k) plan, or a section 401(m) plan, a defined contribution plan also is permitted to satisfy the nondiscriminatory amount requirement by showing that the equivalent benefits provided under the plan are nondiscriminatory in amount under the cross-testing rules in § 1.401(a)(4)-8.

A defined benefit plan generally will satisfy the nondiscriminatory amount requirement by showing that the employer-provided benefits under the plan are nondiscriminatory in amount under § 1.401(a)(4)-3. A defined benefit plan also is permitted to satisfy the nondiscriminatory amount requirement by showing that the equivalent contributions provided under the plan are nondiscriminatory in amount under the cross-testing rules in § 1.401(a)(4)-8.

In addition, plans may use certain alternative methods to demonstrate that contributions or benefits are nondiscriminatory in amount. For example, plans may satisfy the nondiscriminatory amounts requirements of § 1.401(a)(4)-2 or 1.401(a)(4)-3 on a restructured basis. The regulations also permit plans with multiple formulas to satisfy the nondiscriminatory amounts test on the basis of each separate formula, provided each formula separately satisfies the safe harbor requirements in §§ 1.401(a)(4)-2 and 1.401(a)(4)-3. Finally, optional safe harbor testing methods for target benefit plans, cash balance plans, and defined benefit plans that are part of a floor-offset arrangement are provided under the cross-testing rules in § 1.401(a)(4)-8.

General Safe Harbor Requirements

As in the proposed regulations, all of the safe harbors in the final regulations require that the plan have a uniform benefit formula for allocations or accruals, that any subsidized early retirement or joint and survivor benefits in a defined benefit plan be provided on the same terms to substantially all covered employees, that the plan formula base allocations or benefits on a nondiscriminatory definition of compensation, and that the plan have a uniform normal retirement age for all employees. Most of the comments on these safe harbor uniformity requirements focused on the requirement of a uniform benefit formula and a uniform normal retirement age for defined benefit plans. The September 1990 proposed regulations enumerated certain plan provisions that would not cause a safe harbor plan to fail to satisfy the uniformity requirements. The final regulations retain these provisions and provide further modifications and clarifications.

The final regulations provide that, while uniform vesting and service-crediting rules are required under the safe harbors, safe harbor plans may use different methods of calculating service for different purposes, provided they are uniform within each application. The final regulations also provide guidance on methods for making actuarial adjustments to post-normal retirement age benefits under a defined benefit plan that are consistent with a uniform benefit formula.

Under the proposed regulations, a defined benefit plan that provided for offsets for benefits under another defined benefit plan of the employer generally failed to satisfy the uniform benefit formula requirement and, therefore, could not use the safe harbors. Similarly, where a merger or acquisition had occurred, the uniformity requirement was not satisfied if the plan of the acquiring employer provided offsets for benefits under a plan of the former employer. Commentators stated that these offset provisions are a common plan design and requested that the regulations permit a plan with these offset provisions to remain in the safe harbors. In response to these comments, the final regulations permit a plan providing offsets for benefits under another plan of the employer or a former employer to satisfy the safe harbors if certain requirements are met. The provision for offset plans contained in the final regulations reflects the plan design most frequently referred to in comments, that of freezing the benefits under the old plan and providing all prospective accruals under the new plan, a so-called "wrap-around" approach. Recently, additional comments have been received on situations involving employees transferred from one plan to another where the employer does not offset benefits under the new plan with benefits under the old plan, but does continue to provide accruals under the prior plan to reflect compensation increases. This approach raises a number of technical issues, particularly for section 401(l) plans. In addition, the appropriate requirements for future accruals under section 401(a)(4) and for taking transferred employees into account for purposes of section 410(b) raise more complex issues than in the "wrap-around" approach for which safe harbor treatment is provided in the final regulations. Comments are welcomed on appropriate testing methods for addressing this alternative plan design in a safe harbor context.

Several commentators asked that the uniform-normal-retirement-age requirement for safe harbor plans under the proposed regulations be revised to permit use of social security retirement age, presently ranging from age 65 through age 67 depending on the individual's year of birth. The final regulations do not adopt this suggestion. Although sections 401(l) and 415 were amended to incorporate the revision to social security retirement age in the Social Security Amendments of 1983 (Pub. L. 98-21, 97 Stat. 122), corresponding changes to sections 411(a)(8) (defining normal retirement age) and 401(a)(14) (requiring distribution upon attainment of normal retirement age) were not made. Absent statutory amendments linking the concept of normal retirement age under those sections to the social security retirement age, the Treasury and the Service believe it is inappropriate in the context of safe harbor plans to use social security retirement age as a uniform normal retirement age.

The September 1990 proposed regulations contained a set of transition rules for defined benefit plans that are amended to meet the safe harbor requirements. Many commentators requested clarification of these transition rules. They also suggested the development of ongoing transition rules to facilitate the transition of plans into the safe harbors plans. The final regulations contain provisions responsive to both of these requests in § 1.401(a)(4)-13. These provisions are addressed in greater detail in the discussion of that section.

Defined Contribution Safe Harbors

The final regulations, like the proposed regulations, provide two safe harbor tests for defined contribution plans in § 1.401(a)(4)-2(b). The first safe harbor is design-based and permits a defined contribution plan with a uniform allocation formula to satisfy the nondiscriminatory amounts test without calculating allocation rates for individual employees. The second safe harbor permits a defined contribution plan with a uniform allocation formula weighted for age or service to satisfy the nondiscriminatory amounts test if the average rate of allocations for highly compensated employees under the plan does not exceed the average rate of

allocations for nonhighly compensated employees under the plan. As in the proposed regulations published in September 1990, plans using the second safe harbor must provide the same number of points for each unit of compensation, and each unit of compensation must not exceed $200.

Written and oral comments on this age-or-service weighted safe harbor evidenced confusion on its scope and application. Accordingly, the final regulations clarify the safe harbor consistent with the original intent and with the typical plan design upon which the safe harbor was based. See Rev. Rul. 84–155, 84–2 C.B. 95. Thus, under the final regulations, this safe harbor is applicable only to plans in which (1) points are provided on a uniform basis for compensation and for age or service, and (2) an employee's allocation for a plan year is determined by multiplying the total amount to be allocated to all employees by a fraction, the numerator of which is the employee's points for the plan year, and the denominator of which is the sum of the points of all employees in the plan for the plan year. As clarified, the safe harbor is narrower in some respects, but is consistent with the basic policy underlying the general requirement that nondiscrimination in amounts be established on the basis of actual allocation or accrual rates rather than averaged rates and the attendant concern that exceptions that permit some averaging, such as the age and service weighted safe harbor, be narrowly drawn.

Defined Benefit Safe Harbors

The final regulations retain the four defined benefit safe harbors provided in the proposed regulations under which a plan is considered nondiscriminatory with respect to the amount of benefits in § 1.401(a)(4)–3(b). In addition, the final regulations add an additional safe harbor applicable to certain insurance contract plans described in section 412(i).

The first two safe harbors in the final regulations cover certain unit credit plans. A unit credit plan, for purposes of the safe harbors, is a plan that contains a benefit formula that provides all employees with the same number of years of service the same benefit (either as a percentage of compensation or as a dollar amount). The first safe harbor enables unit credit plans to satisfy section 401(a)(4) with respect to the amount of benefits on the basis of plan design. The second unit credit safe harbor permits a plan under which normal retirement benefits are calculated under a unit credit formula but are accrued under the fractional accrual rule of section 411(b)(1)(C) to satisfy the unit credit safe harbor on the basis of plan design if certain requirements are met, even though all employees with the same number of years of service may not accrue the same benefit if they terminate employment at different ages before normal retirement age.

The third safe harbor in the final regulations is a design-based safe harbor for flat benefits plans that satisfy the fractional accrual rule of section 411(b)(1)(C) (e.g., a plan that provides a benefit of 50 percent of average annual compensation, accrued ratably over all years of service), provided the maximum flat benefit is accrued over a period of at least 25 years.

The fourth safe harbor, also for flat benefit plans, requires that the average accrual rate of nonhighly compensated employees as a group be at least 70 percent of the average accrual rate of highly compensated employees as a group. Under the final regulations, the determination of accrual rates for this purpose can be done under any of the methods in § 1.401(a)(4)–3(d). This safe harbor is applied by taking into account all nonexcludable employees of the employer, whether they are covered under the plan or not, and by disregarding benefits provided under any other plans of the employer.

In response to comments, the final regulations provide a new safe harbor for section 412(i) insurance contract plans. Because these plans are subject to special accrual rules and deliver benefits in the form of insurance contract cash values, they are not designed in a way that accords with any of the four safe harbors that were provided in the proposed regulations. A section 412(i) plan generally satisfies this new safe harbor in the final regulations if it satisfies the accrual rule of section 411(b)(1)(F) and certain funding requirements, and if the stated benefit formula under the plan would satisfy either the unit credit fractional accrual safe harbor or the flat benefit fractional accrual safe harbor if the stated normal retirement benefit were accrued ratably over each employee's period of plan participation through normal retirement age.

Other Safe Harbor Testing Methods

Target Benefit Plans

The proposed regulations provided a safe harbor testing method for target benefit plans based on and replacing the rules of Rev. Rul. 76–464, 1976–2 C.B. 115. Target benefit plans are defined contribution plans that calculate contributions by reference to an employee's benefit under a stated, or so-called target, benefit formula. Because target benefit plans are defined contribution plans that determine allocations based on a defined benefit funding approach, this safe harbor was set forth in the rules under § 1.401(a)(4)–8 which provided methods for testing defined contribution plans and defined benefit plans on the basis of equivalent benefits or contributions, respectively. The final regulations retain this safe harbor testing method under the cross-testing rules, but clarify certain provisions of the safe harbor in response to comments.

Many of the comments requested clarification of the contribution requirements under the target benefit safe harbor in the proposed regulations. A number of comments expressed particular uncertainty as to the application of the unit credit funding method alternative permitted in the proposed regulations. Thus, the final regulations contain a step-by-step procedure for determining contributions under the individual level premium funding method based on an employee's stated benefit and "theoretical reserve." An employee's theoretical reserve generally consists of prior contributions with interest accumulated at the plan's assumed interest rate used for funding purposes for prior years. This new procedure requires contributions to be determined exclusively under the individual level premium method.

The unit credit funding method alternative provided in the proposed regulations was eliminated in the final regulations after discussions with practitioners, because practitioners generally found it confusing and found the individual level premium method more useful in that it provided more predictable, level contribution requirements. Consistent with this requirement, the final regulations require the stated benefit formula under a target benefit plan to comply with one of the defined benefit plan safe harbors that uses the fractional accrual rule. The final regulations also generally prohibit the use of employee contributions to fund an employee's stated benefit under the safe harbor, an issue that was reserved in the proposed regulations.

A number of the comments also requested clarification of the impact of the new rules in the proposed regulations on contributions and benefits under an existing target benefit plan. The final regulations clarify that the plan's stated benefit formula must satisfy the transition rules generally applicable to safe harbor defined benefit plans. The final regulations also provide

a special method for determining an employee's theoretical reserve prior to the effective date of the regulations, but otherwise require contributions to be determined after the effective date under the method described in the preceding paragraph, i.e., without disregarding the prior benefit formula or normal cost base in computing contributions in subsequent years.

Cash Balance Plans

Several commentators requested clarification of the treatment of cash balance plans, another hybrid plan design that, unlike target benefit plans, was not addressed in the proposed regulations. Comments indicated that cash balance plans are becoming increasingly popular. Cash balance plans are defined benefit plans that generally determine benefits by reference to an employee's "cash balance" or hypothetical account in a manner analogous to the allocation of contributions and earnings to an employee's account under a defined contribution plan. Under a cash balance plan, each employee's hypothetical account is the sum of the hypothetical allocations for prior plan years provided under a hypothetical allocation formula resembling the allocation formula under a defined contribution plan, plus subsequent interest adjustments through normal retirement age.

The final regulations have added a safe harbor testing method for cash balance plans. Because cash balance plans are defined benefit plans that calculate benefits in a manner similar to defined contribution plans, the safe harbor testing method is provided under the cross-testing rules of § 1.401(a)(4)–8(c). The safe harbor testing method permits a cash balance plan to be tested on the basis of the hypothetical allocation formula used to determine an employee's cash balance, rather than on the actual benefits provided under the plan, if certain conditions are satisfied. Among other requirements, the interest adjustments through normal retirement age must be accrued under the plan in the year the hypothetical allocation to which they relate is accrued, and interest adjustments must be determined using a fixed interest rate between 7.5 and 8.5 percent, or one of a list of variable interest rates provided in the regulations. The fact that interest adjustments through normal retirement age are accrued in the year of the related hypothetical allocation will not cause a cash balance plan to fail to satisfy the requirements of section 411(b)(1)(H), relating to age-based reductions in the rate at which benefits accrue under a plan. The safe harbor also imposes limitations on the granting of past service credit and the provision of subsidized optional forms of benefit.

Some of the comments involving cash balance plans also requested that the final regulations provide special relief for cash balance plans from the requirements of section 417(e). Section 417(e) prescribes certain interest rates that must be used in determining the amount of a single-sum benefit provided under a defined benefit plan. These rates, when combined into a single blended rate, are sometimes lower than the rates used by existing cash balance plans in determining employees' cash balances, and can therefore require a plan that does not use the section 417(e) rates to determine interest adjustments to pay an employee more than the amount of the employee's hypothetical cash balance when benefits are paid in a single sum. The Treasury and the Service have determined that such relief cannot be granted consistent with the requirements of section 417(e). However, in order to minimize the occasions when this problem will arise, the final regulations include a blended section 417(e) interest rate among the alternative safe harbor interest rates a cash balance plan may use in determining interest adjustments.

Plans Offsetting Benefits With Benefits Provided Under Other Plans

The proposed regulations also provided a safe harbor for defined benefit plans that are part of a floor-offset arrangement under the cross-testing rules of § 1.401(a)(4)–8(d). This safe harbor allowed the floor defined benefit plan to be tested on the basis of gross benefits (i.e., prior to the offset) rather than net benefits, if certain conditions were satisfied. This safe harbor has been retained in the final regulations and amended to permit the defined benefit and defined contribution plans to be tested taking into account the restructuring rules of § 1.401(a)(4)–9(c). This safe harbor has also been expanded to provide relief to certain qualified offset arrangements involving plans tested under section 401(k). The floor-offset arrangement has been clarified to state that the offset is applied after application of the defined benefit plans vesting schedule.

Other Safe Harbor Issues

The preamble to the May 1990 proposed regulations indicated that the Treasury and the Service had considered providing a safe harbor for a plan that offsets benefits by a portion of an employee's primary insurance amount (PIA) under Social Security and explained why such a safe harbor had been rejected. Commentators asked that the decision be reconsidered.

Under the statutory provisions of section 401(l), an employee's offset must be determined with reference to the average of the employee's compensation not in excess of the Social Security wage base over the last three years ("final avérage compensation"), rather than with reference to PIA. Thus, providing a safe harbor for PIA-offset plans would be inconsistent with section 401(l) and its legislative history. Moreover, such a safe harbor would require the development and maintenance of additional rules for determining PIA and limiting the amount of the offset. The decision was, therefore, made not to provide a safe harbor for PIA-offset plans. However, changes have been made to the section 401(l) regulations that will enable employers to design a plan that will provide benefit levels generally comparable to those under a PIA-offset formula while still meeting the requirements of section 401(l). This in turn will allow these plans access to safe harbor treatment under section 401(a)(4). These section 401(l) changes are described in more detail in the preamble to the final regulations under section 401(l).

General Test and Restructuring Rules Under the Proposed Regulations

General Test

Under the proposed regulations, plans (other than section 401(k) plans or section 401(m) plans) that did not satisfy one of the safe harbors were required to satisfy the general test under § 1.401(a)(4)–2(c) or 1.401(a)(4)–3(c) to be nondiscriminatory. In general, that test was satisfied only if no highly compensated employee under the plan had an allocation or accrual rate that exceeded that of any nonhighly compensated employee under the plan. In the case of a defined benefit plan, this test was generally applied to both normal accrual rates and most valuable accrual rates. In addition, the proposed regulations provided that separate testing of the normal accrual rates was not required if the plan provided uniform normal retirement benefits and early retirement subsidies and joint and survivor subsidies were provided on a substantially uniform basis. In that case, only the most valuable accrual rate was tested.

Determination of Accrual Rates

The proposed regulations contained provisions for determining allocation or accrual rates and rules explaining the

comparison of these rates for purposes of the general test under the nondiscriminatory amounts requirements. The proposed regulations provided three methods for determining accrual rates under a defined benefit plan: an annual method, an accrued-to-date method, and a projected method.

In general, under the annual method, an employee's normal accrual rate was determined by subtracting the employee's accrued benefit as of the close of the prior year (expressed as a percentage of compensation) from the employee's accrued benefit as of the close of the current year. The annual method generally measures the increase in the employee's benefits that have accrued during the current plan year. Under the accrued-to-date method, an employee's normal accrual rate was equal to the employee's accrued benefit to date (expressed as a percentage of compensation) divided by the employee's years of service to date. Under the projected method, an employee's normal accrual rate equaled the employee's projected accrued benefit at normal retirement age divided by the employee's projected years of service as of that date.

Under any of the three methods, the employer was generally required to determine accrual rates with respect to not only the normal form of benefit, i.e., a single life annuity payable at normal retirement age (the normal accrual rate), but also the most valuable form of benefit (the most valuable accrual rate).

Restructuring

To facilitate testing under the general test, the proposed regulations provided restructuring alternatives that permitted the employer, in certain situations, to divide a single plan into component plans and test each of the component plans separately. Restructuring was permitted under the proposed regulations on the basis of employee groups, total rates, and rate segments. If each of the restructured component plans satisfied the nondiscrimination requirements of section 401(a)(4) and if the group of employees who benefited under the component plan satisfied section 410(b), then the plan in total satisfied section 401(a)(4). The premise of the proposed restructuring rules was to permit an employer to provide under one plan what could otherwise have been provided by establishing a series of separate plans (each of which would have been nondiscriminatory and would have met the coverage requirements).

General Test and Restructuring Rules Under the Final Regulations

General Test—Revised to Automatically Incorporate Restructuring

Many comments were received on the general test and on the restructuring rules after publication of the May 1990 proposed regulations. A number of these comments related to the operation of the general test. In addition, many indicated that, while the restructuring rules were of assistance in satisfying the general test, they were too limited, particularly in the context of testing defined benefit plans for nondiscrimination both as to normal and most valuable accrual rates. Comments further noted a number of technical difficulties encountered in testing the more complex plan designs on a restructured basis. Some of the restructuring issues were addressed in the September 1990 modifications to the proposed regulations. As modified, the proposed regulations permitted employers to restructure sequentially. For example, a plan could be restructured on the basis of employee groups and then the resulting component plans further restructured on the basis of total rates or rate segments. The preamble to these September 1990 proposed regulations acknowledged that the Treasury and the Service wished to develop more comprehensive solution and requested comments on additional or alternative restructuring approaches towards that end.

Comments on the revisions made by the September 1990 proposed regulations welcomed the increased flexibility but, continued to indicate that greater flexibility was needed. After consideration of these comments, and, in particular, consideration of various alternative restructuring approaches suggested both in comments and oral testimony, the final regulations reformulate the general test to incorporate automatically the concept of the rate-segment restructuring rules provided in the proposed regulations in a simpler and more flexible manner.

In applying the new general test under §§ 1.401(a)(4)–2(c) and 1.401(a)(4)–3(c) of the final regulations, the employer must identify, for each highly compensated employee benefiting under the plan, the group of employees consisting of that highly compensated employee and all other employees (both highly compensated and nonhighly compensated) with equal or greater normal and most valuable accrual rates ("a rate group"). Thus, depending on their accrual rates, employees may be included in more than one rate group. A rate group must be determined for each highly compensated employee benefiting under the plan. Each rate group so identified must satisfy the requirements of section 410(b) as though it were a separate plan. Special rules are provided for application of the average benefits test in rate groups.

Thus, under the reformulated approach of the final regulations, the plan is first restructured into rate groups, each of which is tested as though it were a separate plan currently benefiting the group of employees included in the rate group. If each of these rate groups satisfies the requirements of section 410(b) as though it were a separate plan, the plan in total satisfies the nondiscriminatory amount requirement. Because restructuring on the basis of rate groups takes into account all employees with accrual or allocation rates at or above the allocation or accrual rate being tested, this approach automatically achieves the most favorable results that were available under the restructuring rules in the proposed regulations, and, in many situations in fact produces more favorable results than could have been achieved under the rules in the proposed regulations, without the design and technical complexity involved in establishing rate and rate-segment component plans.

In the case of plans tested on the basis of both normal and most valuable accrual rates, this automatic restructuring approach has two significant advantages. First, because employees are taken into account in every rate group with an equal or lower accrual rate, this method achieves positive results for plans attempting to satisfy the nondiscriminatory amounts requirements that would have been impossible to achieve under the sequential restructuring methods available in the proposed regulations. In addition, this automatic restructuring approach takes both normal and most valuable accrual rates into account, thereby eliminating the difficulties that arose under the proposed regulations in determining the most valuable rates associated with normal rates (where that determination was required).

Included in the many comments on restructuring that were considered in developing this new more flexible restructuring approach were comments suggesting that averaging be permitted for purposes of nondiscriminatory amounts testing. After considering the comments, the Treasury and the Service believe that the new restructuring approach in the final regulations gives the broadest range of employers necessary flexibility while remaining consistent with the statutory

nondiscrimination requirements. Furthermore, averaging can produce arbitrary results, particularly in the case of small and medium-sized employers. For example, assume that, in order to satisfy section 410(b), a salaried plan covering predominantly highly compensated employees and providing a benefit of 10 percent of compensation must be aggregated with an hourly plan covering mostly nonhighly compensated employees and providing a benefit of 15 percent of compensation. The aggregated plans satisfy section 410(b) and would satisfy section 401(a)(4) either on the basis of the restructuring rules provided in the regulations or on the basis of averaging. The hourly plan is then amended to cover additional nonhighly compensated employees, and provides these employees with a benefit of 5 percent of compensation. At some point the additional coverage of nonhighly compensated employees may cause the average for nonhighly compensated employees to drop below the 10 percent average for highly compensated employees. Under those circumstances, this plan would satisfy nondiscriminatory amounts testing under the restructuring approach in the final regulations because the rate groups for the highly compensated employees satisfy the ratio percentage test of section 410(b). The plan would fail under an averaging approach.

Testing Solely on the Basis of Most Valuable Accrual Rates

The final regulations retain a general test alternative under which a plan may, in certain circumstances, satisfy the general test solely on the basis of testing the most valuable accrual rates without separate testing of normal accrual rates. This test recognizes that, if the general test is satisfied with regard to employees' most valuable accrual rates, and the adjustments from normal to most valuable benefits under the plan are calculated on a consistent basis for all employees, then the normal accrual rates automatically satisfy the general test. The proposed regulations attempted to implement this concept by requiring a uniform normal retirement benefit formula and substantial uniformity in early retirement subsidies and joint and survivor subsidies. Because the proposed regulations did not provide guidance on the uniformity requirement, and because the same concept was applied differently in the safe harbors, there was confusion as to the scope and application of most-valuable-only testing. The final regulations modify the tests by eliminating the requirement for equivalent normal retirement benefits while providing more explicit requirements for uniformity in benefit subsidies. Although some plans that formerly appeared to fall within the scope of most valuable only testing may no longer qualify under the rule, as modified, these plans should generally satisfy the modified general test on the basis of both normal and most valuable benefits using the new automatic restructuring provisions.

Accrual Rates

Qualified Social Security Supplements

The proposed regulations provided that, for purposes of the general test, only accrued benefits within the meaning of section 411(a) could be taken into account. Several commentators argued in favor of taking social security supplements into account in determining the most valuable accrual rate. While social security supplements are clearly retirement-related, they are ancillary benefits and, unlike accrued benefits, early retirement benefits, and retirement-type subsidies, are not protected from retroactive elimination or reduction by section 411(d)(6). Nevertheless, commentators on the proposed regulations indicated that there are a number of plans that provide social security supplements as part of the employees' retirement benefits and that treat these amounts in the same manner as any other accrued retirement benefit.

In response to these comments, the final regulations provide that an employer may take "qualified social security supplements" into account, both in determining the most valuable accrual rate for use in satisfying the nondiscriminatory amounts requirement and in determining permitted disparity under section 401(l). The regulations define a "qualified social security supplement," and require that these qualified social security supplements be subject to accrual and anti-cutback protections under the plan in a manner directly analogous to early retirement benefits and retirement-type subsidies protected by the statutory language of section 411(d)(6). These protections must be provided explicitly in the plan. It should be noted that social security supplements must be described in the summary plan description of the plan and any summary of material modifications of the plan in a manner consistent with the requirements of section 102 of the Employee Retirement Income and Security Act of 1974, as amended, and the regulations thereunder (Pub. L. No. 93-406).

Determination of Accrual Rates

General Methodology

The written and oral comments on the proposed regulations indicated that the accrual rates used in applying the general test were not being calculated in a consistent manner by practitioners and plan sponsors. In particular, many of those attempting to apply the tests were uncertain about how to calculate most valuable accrual rates and the option to exclude benefits accruing after a date selected by the employer. In response to these comments, the final regulations provide specific guidance on the determination of accrual rates by incorporating step-by-step procedures that spell out the details of the calculations in § 1.401(a)(4)-3(d). This guidance is intended to achieve consistency in the general test and to provide certainty for employers and practitioners in the application of the test. Although guidance of this type is often provided in revenue procedures, the integral relationship of these calculations to the general test made its inclusion in § 1.401(a)(4)-3 preferable.

Annual, Accrued-To-Date, and Projected Methods

The final regulations generally retain the three methods for determining accrual rates provided in the proposed regulations. However, changes were made in the annual method in order to insure that the method was administrable and operated in a manner consistent with the purposes of the nondiscriminatory amount requirement. The annual method under the proposed regulations was intended to measure the increase in an employee's benefits during the current plan year. The May 1990 proposed regulations, however, attempted to permit elimination of current year accruals attributable to compensation increases under a final pay formula and current year benefit increases attributable to past service credits granted in the current year from the determination of accrual rates and, thereby, from nondiscrimination testing.

After issuance of the proposed regulations, a number of commentators indicated that this approach, which was intended to stabilize accrual rates generated under the annual method, in fact produced erratic, unintended results including negative accrual rates. In addition, some commentators expressed concern that these adjustments resulted in several significant problems for employers and employees including (1) making the annual method unworkable for plans that have a different compensation basis than the

compensation used to determine benefits (e.g., a career average accumulation plan tested on the basis of a 3-year average), (2) permitting continued accruals under prior-law excess-only integrated plans that ceased to qualify after TRA '86, and (3) difficulty in defining the relevant past-service credits.

The September 1990 proposed regulations corrected some of the technical problems but left many of the issues unresolved. In developing final regulations, consideration was given to approaches intended to eliminate the technical complexity and arbitrary results arising from the adjustments under the annual method and to control for significant potential discrimination problems. These approaches added significant complexity to the testing process without significantly improving the utility of the test, however. Therefore, the final regulations generally retain the annual method alternative in the September 1990 proposed regulations, and no longer permit elimination of accruals resulting from increases in compensation and grants of past service as in the original May 1990 proposed regulations.

While this change will reduce the potential utility of the annual method approach for final average pay plans, these plans should generally be able to satisfy section 401(a)(4) using either the accrued-to-date or the projected method alternatives. At the same time, the change makes the annual method a practical method for accumulation plans that were generally not able to satisfy section 401(a)(4) using either of the other two alternative methods under the general test. Further, under the transition rules in § 1.401(a)(4)–13, employers who have amended their plans in the past or who amend their plans to comply with TRA '86 by the last day of the first plan year beginning on or after January 1, 1992, may disregard certain increases in accruals resulting from increases in compensation relating to any benefits under the prior plan formula.

Other Issues

Many commentators requested clarification of the treatment of early retirement window benefits. The final regulations clarify that these benefits are taken into account in determining most valuable accrual rates but provide a simplified testing method under which employees who will be eligible by the end of the window period are treated as eligible as of the first day of the window period.

Several commentators expressed concern that disability benefits provided under defined benefit plans may result in failure of these plans to satisfy amounts testing and asked for special rules. The final regulations do not provide any special rules. However, in general, the provision of disability benefits should not result in a failure of a defined benefit plan to satisfy the nondiscriminatory amounts requirement. A disability benefit that is not in excess of a qualified disability benefit is an ancillary benefit that is not subject to amounts testing. Under section 411(a)(9), a qualified disability benefit can be provided up to the maximum normal retirement benefit, and can commence either at the time of disability (without actuarial reduction) or at normal retirement age. A benefit attributable to the period while an employee is disabled continues to be characterized as a qualified disability benefit even though an employee returns to work or reaches normal retirement age. Consequently, a plan that provides benefits attributable to the period an employee is disabled does not have to test these benefits under the nondiscriminatory amounts requirement of section 401(a)(4) because these benefits are qualified disability benefits and thus, are not included in the calculation of an employee's accrued benefit.

Correction Mechanisms

Many commentators stressed that practical problems often prevented data collection and plan testing in sufficient time to correct for failure to satisfy the nondiscrimination requirements. In developing the final regulations two basic alternatives were considered. Use of prior year data, which was suggested by some commentators, is not generally permitted in the final regulations. The primary reason is that use of prior year data could materially undercut the statutory nondiscrimination requirements, unless the old data were required to be modified to reflect certain significant changes (such as significant changes in the composition of the employer's workforce and plan participants). Such an approach would have been difficult for practitioners to apply and the Service to administer.

The other approach suggested by a number of commentators was to permit retroactive correction of the plan for a reasonable period of time after the end of the plan year for purposes of satisfying the nondiscriminatory amounts requirement. This alternative has been adopted in § 1.401(a)(4)–11(g) of the final regulations. The retroactive correction period in the final regulations extends through the 15th day of the 10th month after the end of the plan year. This approach, which is similar to that contained in section 401(b) with respect to certain disqualifying provisions, provides the employer with a significant period within which to run any necessary tests and take corrective action.

In order to permit employers to make practical choices based on administrative concerns, use of the retroactive correction period is not conditioned on a demonstration that the plan actually failed to satisfy the nondiscrimination requirements. In addition, the correction is not limited to amendments correcting disqualifying defects. The final regulations do require, however, that any retroactive amendment under this provision be nondiscriminatory standing alone and be consistent with the anti-cutback rules of section 411(d)(6).

2. Nondiscriminatory Availability of Benefits, Rights, and Features

The second requirement a plan must satisfy under the regulations is that the benefits, rights, and features provided under the plan must be made available to the employees in the plan in a nondiscriminatory manner. Rules for satisfying this requirement are set forth in § 1.401(a)(4)–4. The final regulations retain the basic structure of the proposed regulations in testing nondiscriminatory availability and incorporate the relevant provisions of the prior final regulations under § 1.401(a)–4 on optional forms of benefit.

The final regulations, like the proposed regulations, require that each optional form of benefit, each ancillary benefit, and each other right or feature provided under a plan must separately satisfy section 401(a)(4) with respect to its availability. However, this rule has been modified in the final regulations to permit two or more benefits, rights, and features to be permissively aggregated if one of the benefits, rights, or features is inherently of equal or greater value than the other, and the more valuable benefit, right, or feature, standing alone, satisfies the current and effective availability requirements of § 1.401(a)(4)–4.

Under the proposed regulations, optional forms of benefit available to a group of employees affected by a merger or acquisition were deemed to satisfy the nondiscriminatory availability requirement if they were available to a group of employees that satisfied section 410(b) immediately before and immediately after the transaction (the special merger rule). The final regulations retain the special merger rule but broaden it in response to comments. Under the final regulations,

an employer may expand the group of employees to whom the special merger rules applies to include new employees who come into the acquired group of employees during the period described in section 410(b)(6)(D). In addition, the final regulations are clarified to provide explicitly that the special merger rule is applicable to both stock and asset acquisitions and any similar types of transactions involving a change in employers for employees of a trade or business.

The proposed regulations also provide a special rule for testing the availability of optional forms of benefit that were eliminated with respect to prospective accruals but retained, as required by section 411(d)(6) for existing accruals. Under this special rule, the availability of such optional forms of benefits satisfied section 401(a)(4) if the optional form of benefit satisfied the current and effective availability requirements of the regulation immediately before the effective date of the prospective elimination.

The nondiscriminatory availability requirements in the proposed regulations built on the approach taken in the final regulations under § 1.401(a)–4 regarding optional forms of benefit and extended the substantive rules of that section to other plan benefits, rights, and features. Under the proposed regulations, any age and service conditions on availability were generally disregarded for purposes of the current availability requirements. This provision permitted testing on the assumption that employees will ultimately satisfy the age or service condition and, when applied to benefits that are protected against reduction or elimination by section 411(d)(6), is consistent with the policies underlying the nondiscrimination testing of retirement benefits. However, ancillary benefits and other rights and features provided under the plan (e.g., loans and investment alternatives) may be reduced or eliminated at any time, and therefore, are of value only to the participants to whom they are available in the current year. Nondiscriminatory availability of these benefits therefore requires that they be currently and effectively available in the current year taking age and service conditions into account. The final regulations are modified to so limit the rule consistent with its original intent. Under an exception, however, the special testing rule is extended to social security supplements as well. Thus, under the final regulations, age and service conditions are disregarded only with respect to optional forms of benefit and social security supplements.

3. Nondiscriminatory Effect of Plan Amendments and Terminations

The third requirement a plan must satisfy under the regulations is that the effect of plan amendments (including grants of past service) and terminations be nondiscriminatory. Rules for satisfying this requirement are set forth in § 1.401(a)(4)–5. Under the proposed regulations, plan amendments must not have the effect of discriminating in favor of highly compensated employees. For grants of past service credit, the standard was significant discrimination. In both cases, whether a plan met the requirement depended in general on the relevant facts and circumstances. The use of a general anti-abuse standard based on facts and circumstances was designed to permit plans to be amended and past service credit to be granted in a manner consistent with both the nondiscrimination rules and business practices.

In response to comments, the final regulations consolidate the plan amendment and past service credit rules, broaden the significant discrimination standard to apply to both plan amendments and grants of past service, clarify the definition of plan amendment, and specify the time at which testing is done. The final regulations also clarify that if an amendment is prospective and the benefits under the plan as amended satisfy the nondiscriminatory amounts requirement under section 401(a)(4), the amendment generally will not violate § 1.401(a)(4)–5.

Under the proposed and final regulations, as under prior guidance, the determination of whether a grant of past service is discriminatory is based on facts and circumstances. In developing the proposed and final regulations, Treasury and the Service recognized that past administration of the nondiscrimination requirements in this area has sometimes been inconsistent. Therefore, in order to provide greater certainty and to enhance consistency in administration, the proposed regulations provided a five year safe harbor and further provided a list of some of the relevant factors for facts and circumstances testing, based on existing guidance.

The final regulations retain both the past service safe harbor and the enumerated factors contained in the proposed regulations. Under the safe harbor, a grant of up to 5 years of past service credit is deemed to be nondiscriminatory. The existence of this safe harbor does not mean that a grant of past service credit for a longer period violates the nondiscrimination rules.

The requirement that a plan's effect in certain special circumstances be nondiscriminatory also covers plan terminations. The proposed regulations significantly liberalized the rules under § 1.401–4(c) restricting distributions to highly compensated employees upon termination of a defined benefit plan. Under these final regulations, as under the proposed regulations, the early termination restrictions are inapplicable if the payment is less than 1 percent of plan assets or, after the payment of the benefit, the value of plan assets is at least 110 percent of the plan's current liabilities, as defined in section 412(l)(7).

A number of commentators expressed confusion about the extent to which the old early termination restrictions and the administrative rules applicable to them are still in effect. As part of these final regulations, the final regulations under § 1.401–4(c) are obsolete for distributions after January 1, 1992. In addition, the employer may rely on these regulations and the proposed regulations, in lieu of the regulations under § 1.401–4(c), for any distributions on or after May 14, 1990. Furthermore, with respect to distributions that were restricted or escrowed under the rules in § 1.401–4(c) that may be distributed to the employee under the rules in these final regulations, the employer may either retain the existing restrictions or escrow, or amend the plan to release the distributions to the extent permitted under these final regulations. In general, it is intended that the relevant administrative procedures applicable to restricted amounts under § 1.401–4(c) will continue to be available for restricted amounts under the new provisions. A revenue ruling reinstating these procedures, and in particular the provisions for escrow arrangements, will be issued in the near future.

4. Employee Contributions

Section 1.401(a)(4)–6 provides rules for defined benefit plans that include employee contributions that are essentially the same as in the proposed regulations. Generally, under the proposed and final regulations, benefits derived from employer contributions and benefits derived from employee contributions must separately satisfy section 401(a)(4). Rules are provided for determining the employer-derived benefit in a defined benefit plan that also includes employee contributions not allocated to separate accounts as well as for determining whether employee contributions under a defined benefit plan are nondiscriminatory.

Like the proposed regulations, the final regulations provide that the

determination of the employer-derived benefit generally follows the method prescribed in section 411(c). In addition, the final regulations retain and clarify several simpler alternatives provided in the proposed regulations. The final regulations have also been revised to consolidate rules in the proposed regulations under section 401(l) relating to employee contributions under a defined benefit plan with the section 401(a)(4) rules. In response to comments, the option of using a uniform factor to determine the portion of an employee's benefit attributable to employee contributions has been expanded to apply in certain cases where the rate of employee contributions increases at higher levels of compensation ("integrated" or "step-rate contributions"). Under the proposed regulations, a plan that included step-rate employee contributions could determine the employee-provided benefit on an individual basis, usually resulting in an employer-provided benefit that would fail to satisfy section 401(l). The modification made in the final regulations allows a plan that includes step-rate employee contributions to determine the employee-provided benefit more simply and should result in a rate of employer-provided benefit that is more likely to satisfy section 401(l).

5. Permitted Disparity

The final regulations, like the proposed regulations, allow the disparity permitted by section 401(l) to be taken into account in showing that the amount of contributions or benefits satisfies section 401(a)(4). As under the proposed regulations, the determination of whether a plan satisfies the permitted disparity requirements in many cases merely requires inspection of the plan benefit or contribution formula, i.e., where a plan is using one of the safe harbor rules for showing nondiscrimination in the amount of contributions or benefits and thus is required to satisfy section 401(l) in form.

If a plan does not use the safe harbor rules, permitted disparity is taken into account by using specified formulas that adjust allocation or accrual rate to reflect the amount of permitted disparity that may be taken into account. The rules for imputing permitted disparity are set forth in § 1.401(a)(4)–7. The adjusted rates effectively transform the allocations or accruals under the plan for each employee to determine the excess rate each employee would receive if the same dollar value of allocation or accrual had been received under a plan formula containing the maximum permitted disparity under section 401(l). The resulting excess rates are the allocation rates or accrual rates that are compared to determine whether the plan satisfies the general tests in § 1.401(a)(4)–2 or 1.401(a)(4)–3.

Because of the close interrelationship between sections 401(a)(4) and 401(l), the final regulations under both sections were developed together and have been clarified and modified where necessary to reflect a consistent and coordinated approach to permitted disparity. The modifications that have been made with respect to the permitted disparity rules are discussed in detail in the preamble to the final regulations under section 401(l), published simultaneously with these final regulations.

6. Cross-Testing Defined Benefit and Defined Contribution Plans

The proposed regulations provided methods for testing defined benefit plans on the basis of equivalent contributions and testing defined contribution plans on the basis of equivalent benefits. These rules were generally based on and replaced the rules of Rev. Rul. 81–202. The final regulations clarify these methods and coordinate them with the general testing methods provided in the general testing methods. In response to comments, they also provided that standard interest and mortality assumptions must be used to determine equivalent benefits under a defined contribution plan, and clarify the availability of various optional methods of calculating allocations and accruals under §§ 1.401(a)(4)–2 and 1.401(a)(4)–3 when a plan is cross-tested. As discussed above, the cross testing rules have been expanded to provide safe harbor testing methods for cash balance plans, to expand the safe harbor testing methods for floor offset plans, and to clarify the safe harbor testing methods for target benefit plans.

7. Definition of a Plan and Plan Aggregation

The proposed and final regulations require plans that are aggregated for purposes of section 410(b) to be tested on an aggregated basis under section 401(a)(4). Under the proposed regulations, allocation and accrual rates under an aggregated plan were calculated by adding together the allocation and accrual rates for each employee, separately determined for each plan in the aggregated plan. The final regulations simplify this determination by providing that all plans of a single type (i.e., defined benefit or defined contribution) within a single aggregated plan are treated as a single plan, and are thus not subject to any special aggregation rules. Thus, only aggregated plans consisting of both defined benefit and defined contribution plans are subject to the special testing rules of § 1.401(a)(4)–9(b). The final regulations also clarify that the amount of permitted disparity that may be taken into account with respect to an aggregated plan is determined after calculating employees' aggregate allocation and accrual rates under the plan and taking into account the overall permitted disparity imputation with respect to employees'. This approach avoids an unintended limitation on the use of permitted disparity that could have resulted under the proposed regulations.

The proposed regulations contained a special rule for determining whether benefits, rights and features under an aggregated plan that includes both defined benefit and defined contribution plans were currently available on a nondiscriminatory basis. The final regulations retain this rule and expand it to include the effective availability test as well as the current availability test under § 1.401(a)(4)–4. The proposed regulations provided special testing rules for spousal benefits required under section 401(a)(11) in this section. This rule is retained in the final regulations, but is provided in § 1.401(a)(4)–4. In response to comments, the final regulations clarify that whether a spousal benefit is subsidized for this purpose may generally be determined using the plan's own actuarial assumptions.

8. Plan Restructuring

The proposed regulations permitted a plan to be restructured into component plans using one of three methods: Employee group restructuring, total rate restructuring, and rate segment restructuring. As discussed earlier in the context of testing for nondiscrimination in amounts, the total rate and rate-segment restructuring rules in the proposed regulations have become an automatic part of the nondiscriminatory amounts general test in the final regulations. The final regulations retain, in § 1.401(a)(4)–9(c), the employee group restructuring alternative. However, because of the integration of the rate-segment restructuring rules in the general test, it has been possible in the final regulations to eliminate most restrictions on the employee group restructuring alternative. Thus, the final regulations no longer require that employee group restructuring be limited to situations in which the members of the employee group have some common attribute other than allocation or accrual rates. In addition, as a result of this

change, it has been possible to eliminate other restrictions on the use of employee group restructuring, including special rules that were relevant primarily to total rate and rate segment restructuring. Thus, the employee groups used to form component plans may generally be selected using any method. The final regulations also clarify that the restructuring rules apply for purposes of section 401(l), and those portions of sections 410(b), 414(s), and other provisions that are specifically applicable in determining whether the requirements of section 401(a)(4) are satisfied.

9. Testing of Plans With Respect to Former Employees

Under both the proposed regulations and the final regulations, §§ 1.401(a)(4)–1 and 1.401(a)(4)–10 require that a plan separately satisfy section 401(a)(4) with respect to the amount of benefits or contributions and with respect to the availability of benefits, rights, and features provided to employees and former employees.

In general, the final regulations retain the rules provided in the proposed regulations but clarify certain aspects of the requirements in response to comments. For example, the final regulations provide additional guidance with respect to the manner in which the safe harbors and the general test apply to former employees, including coordinating these rules with the rules for former employees under section 410(b). In addition, a safe harbor is provided in the final regulations for plans that are amended to provide an ad hoc cost-of-living adjustment. In order to satisfy this safe harbor, a cost-of-living increase must be provided on a uniform and consistent basis and must generally be limited to the percentage increase in social security benefits under the provisions of the Social Security Act. In determining permissible uniform increases, an employer may group former employees based on their date of retirement into bands not exceeding 5 consecutive years in length. Because automatic costs-of-living adjustments are part of the accrued benefit and are taken into account in satisfying the nondiscriminatory amounts requirements for employees, they are not tested again with respect to former employees.

The rules in both the proposed and final regulations for determining whether a plan satisfies section 401(a)(4) with respect to the availability of benefits, rights, and features provided to former employees are also generally the same as those applicable to current employees The final regulations expand a rule in the proposed regulations under which a plan is generally deemed to satisfy section 401(a)(4) with respect to the availability of benefits, rights, and features provided to former employees if the availability of any benefits, rights, or features subject to availability testing has not been amended during the current plan year, or, alternatively, if any changes in availability in the current plan year are made in a nondiscriminatory manner. Thus, under the final regulations, nondiscrimination testing of the availability of benefits, rights, and features to former employees is required only in the year in which an amendment to the availability of benefits, rights, and features to former employees is first effective.

10. Additional Rules

Like the proposed regulations, the final regulations provide that benefits and account balances attributable to rollovers and elective transfers generally are not taken into account in determining whether the amount of benefits or contributions provided under the plan satisfies section 401(a)(4). Similarly, the final regulations continue the current requirement that the manner in which employees vest in their accrued benefits under a plan must not discriminate in favor of highly compensated employees.

The final regulations add a requirement that service be credited on a nondiscriminatory basis. A special rule is provided permitting service to be credited for certain periods during which the employee is on a leave of absence. This is necessary to coordinate the nondiscrimination testing rules in section 401(a)(4) with the new rules contained in the final regulations under section 414(s) that permits compensation to be imputed during certain leaves of absence.

11. Transition and Fresh-Start Rules

The September 1990 proposed regulations set forth several alternative methods for taking into account benefits attributable to years prior to the effective date of the regulations for purposes of applying the safe harbors for defined benefit plans. These methods generally required the pre-effective date benefits to be frozen, and benefits for future years to be determined as the sum of the pre-effective date benefits and the post-effective date benefits. Alternatively, a plan was permitted to determine the benefits for all years under one of two "wear-away" approaches that provided plans additional flexibility in transitioning into the post-TRA '86 nondiscrimination rules while continuing to satisfy the anti-cutback rules of section 411(d)(6). The proposed regulations also provided that, in certain circumstances, an employee's frozen benefit under a final or career average pay plan could be increased to reflect subsequent increases in compensation. In addition, the proposed regulations permitted the accrued-to-date and projected methods to be applied with respect to benefits accruing and service after a date selected by the employer before December 31, 1991, but did not provide guidance on applying this "fresh-start" option.

The final regulations generally retain these effective date transition rules in § 1.401(a)(4)–13, but coordinate them with the fresh-start option for the accrued-to-date and projected methods, in addition to clarifying and expanding the rules in certain respects. For example, the final regulations provide additional guidance on what changes can be made to a benefit, while still allowing the benefit to be considered frozen. In addition, under the final regulations, all of the transition and fresh-start rules have been expanded to permit transitions and fresh starts in any year after the effective date as well as before. However, the adjustment to an employee's frozen benefit under a final or career average pay-type plan to reflect subsequent increases in compensation only applies to transitions or fresh starts before the effective date. In addition, special transition rules have been added in the final regulations for target benefit plans and cash balance plans.

12. Governmental Plans

Under the proposed regulations, section 401(a)(4) was considered to be satisfied in the case of governmental plans described in section 414(d) for plan years beginning before 1993. This provision has been retained in the final regulations. In addition, the final regulations provide that, if the governing body with authority to amend the plan does not meet continuously, section 401(a)(4) will be considered satisfied for plan years beginning before 90 days after the opening of the first legislative session on or after January 1, 1993.

The delayed effective date provision in the proposed regulations resulted in some comments that governmental plans should not be subject to nondiscrimination testing. In the absence of statutory provisions excepting governmental plans from these requirements, the final regulations recognize their applicability. Nevertheless, the Treasury and the Service recognize that governmental

plans may have some unique features that arise because the sponsoring employer is a governmental entity. Some comments have been received on such features and additional comments are specifically requested from governmental employers regarding the appropriate modifications to the regulations to take into account the operation of government plans. A section in the final regulations has been reserved for rules that will address these unique features.

13. Merger and Acquisitions

In general, although some expanded guidance is provided in the final regulations regarding nondiscrimination testing under section 401(a)(4) and related Code sections where the employer has engaged in a merger, acquisition, or similar transaction, the final regulations do not address these issues in a comprehensive way. The Treasury and the Service have opened a regulations project relating to these issues, and intend to address them separately. Comments are specifically requested concerning areas of practical concern and appropriate modifications to the regulations to address these matters. While these regulations are generally effective for plan years beginning after December 31, 1991, the Treasury and the Service recognize that in some situations, unique problems related to a merger or acquisition may make exact adherence to some of the provisions of the regulations impossible. For example, it may be difficult to obtain prior year data necessary for determining with certainty whether certain acquired employees are highly compensated employees. Pending issuance of further guidance, in limited situations, in the context of a merger or acquisition, a reasonable good faith effort to satisfy the nondiscrimination requirements consistent with the statutory and regulatory requirements will be acceptable. Whether compliance is reasonable and in good faith in this context require that the employer make every reasonable effort to satisfy all relevant portions of this regulation.

14. Plans Maintained by More Than One Employer

Multiple employer plans must satisfy section 401(a)(4) on an employer-by-employer basis rather than on the basis of participating employers in the aggregate. Any noncollectively bargained portion of a multiemployer plan is tested as a multiple employer plan. The consequences of failure to satisfy section 401(a)(4) with respect to any component of this testing process may effect the plan for all participating employers. The final regulations, like the proposed regulations, do not provide an exception to this rule. However, where a multiemployer plan or a multiple employer plan fails to satisfy section 401(a)(4), in a proper case, the Commissioner could treat the plan as satisfying section 401(a)(4) for innocent employers by requiring corrective and remedial action with respect to the plan, such as allowing the withdrawal of an offending employer, allowing a disqualifying defect to be cured within a reasonable period of time after the plan administrator has or should have knowledge of the disqualifying event or was otherwise notified by the Service of the disqualifying defects, or requiring plan amendments to prevent future disqualifying events.

15. Effective Dates

The final regulations are generally effective for plan years beginning after December 31, 1991. For plan years beginning before that date and on or after the first day of the first plan year to which the amendments made by section 1112(a) of TRA '86 apply to a plan § 1.401(a)(4)–13 provides that a plan must be operated in accordance with a reasonable, good faith interpretation of the requirements of section 401(a)(4), taking into account pre-existing guidance and the amendments made by TRA '86 to related Code provisions, such as sections 401(l), 401(a)(17), and 410(b). Whether compliance is reasonable and in good faith will generally be determined on the basis of facts and circumstances, including the extent to which the employer has consistently resolved all unclear issues in its favor. Reasonable, good faith compliance will be deemed to exist, however, if a plan is operated in accordance with the proposed regulations.

In Rev. Proc. 90–73, 1990–2 C.B. 786, the Internal Revenue Service extended the date by which the plan amendments to comply with TRA '86 must be made until the close of the 1992 plan year. This extended amendment date, combined with the reasonable, good faith compliance standard contained in these proposed regulations, is designed to ensure that plan sponsors have a reasonable period in which to amend qualified plans.

16. Failure to Comply

In general, under section 402(b)(1) of the Code, if a plan fails to satisfy the qualification requirements contained in section 401(a) of the Code, the tax-exempt status of plan earnings is revoked, employer deductions for contributions may be deferred or denied, and all employees must include the value of plan contributions in income in accordance with section 83. Thus, if contributions are made to the plan with respect to vested accounts or benefits, employees must include these amounts in income.

In addition to the general rule of section 402(b)(1), section 402(b)(2) contains special rules that apply if the plan fails to satisfy section 401(a)(26) or 410(b). If the plan fails to satisfy either of these sections, each highly compensated employee must include in income an amount equal to the employee's entire vested accrued benefit not yet included in income. If, however, the plan is not qualified solely because it fails to satisfy the requirements of section 401(a)(26) or 410(b), no adverse tax consequences are imposed on nonhighly compensated employees.

Under the integrated approach to sections 401(a)(4) and 410(b) underlying the regulations, any failure to satisfy section 401(a)(4) constitutes a failure to satisfy section 410(b). Consequently, failure to meet the requirements of section 401(a)(4) will cause section 402(b)(2) to apply with respect to a plan, and will therefore subject highly compensated employees to the special sanctions contained in that section. Similarly, if the plan satisfies all qualification requirements other than sections 410(b) and 401(a)(26), no adverse tax consequences will be imposed on nonhighly compensated employees.

17. Incomplete or Inaccurate Data

In some cases, use of a decentralized payroll or personnel recordkeeping system may result in incomplete data that makes it impossible to confirm compliance with sections 401(a)(4) 401(l), 410(b), and 414(s) or inaccurate data that indicates apparent noncompliance with those sections. The preamble to the proposed regulations provided that, in limited cases, the Service would generally permit an employer to use reasonable estimates in lieu of missing or inaccurate data.

Comments on the conditions for estimating data set forth in the preamble to the proposed regulations indicate that many employers maintaining defined benefit plans have difficulty meeting the conditions in the case of employee compensation data. In response to the comments received, the Service has establish separate conditions for estimating missing or inaccurate employee compensation data for plan years beginning before January 1, 1995. These are described below. For estimating data other than

compensation data, the conditions set forth in the preamble to the proposed regulations are retained.

General Rule

For noncompensation data or compensation data for plan years beginning on or after January 1, 1995, an employer is permitted to use reasonable estimates of data provided the following conditions are met: (1) The incomplete or inaccurate data pertain to no more than a de minimis number of employees relative to the number of employees in the testing population; (2) if the data pertain to highly compensated employees, they do not pertain to the most highly compensated employees in the testing population, and the employer has more than a small number of highly compensated employees in its overall workforce; (3) the data difficulties could not have been avoided through reasonably careful administrative procedures; (4) in the case of incomplete data, the employer has made a reasonable effort to obtain the data without success; (5) in the case of inaccurate data, the data are obviously inaccurate on their face given the characteristics of the plan and the employer's workforce, and the employer has made a reasonable effort to obtain accurate data without success; and (6) the employer takes appropriate steps to correct the data difficulties in future years.

Special Rule for Compensation Data for Plan Years Beginning Before January 1, 1995

A special rule is provided for estimating compensation data for plan years beginning before January 1, 1995. Under this rule, an employer is permitted to use reasonable estimates of compensation data provided the following conditions are met: (1) The incomplete or inaccurate data does not pertain to a significant number of employees relative to the number of employees in the testing population; (2) if the data pertain to highly compensated employees, they do not pertain to the most highly compensated employees in the testing population, and the employer has more than a small number of highly compensated employees in its overall workforce; (3) the employer takes reasonable steps to correct the data difficulties as soon as possible and no later than plan years beginning on or after January 1, 1995; (4) the estimate is a reasonable approximation of actual data based on reasonable assumptions. These requirements do not apply to plans that determine compensation using an employee's rate of pay as otherwise permitted under the regulations for section 414(s).

18. Effect On Other Laws

Compliance with the provisions of this regulation does not ensure compliance with other applicable Federal laws, including, but not limited to, the provisions of title I of the Employee Retirement Income Security Act of 1974 which are administered by the Secretary of Labor pursuant to Reorganization Plan Number 4 of 1978. Employers should note that plan amendments pursuant to this regulation may necessitate reporting and disclosure under such Act, including requirements related to summary plan descriptions and summaries of material modifications.

19. Additional Authority

The rules in the regulations regarding section 401(a)(4) are the exclusive rules for determining whether the requirements of that section are met. The regulations also provide, however, that the commissioner may, in revenue rulings, notices, and other guidance of general applicability, provide any additional rules that may be necessary or appropriate in applying the nondiscrimination requirements of section 401(a)(4).

Special Analyses

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations and, therefore, a final Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the notices of proposed rulemaking for these regulations published after November 20, 1988, were submitted to the Administrator of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal authors of these proposed regulations are Nancy J. Marks, David Munroe, Marjorie Hoffman, Patricia McDermott, Suzanne Tank, and Rebecca Wilson of the Office of the Assistant Chief Counsel (Employee Benefits and Exempt Organizations), Internal Revenue Service. However, personnel from other offices of the Service and Treasury Department participated in their development.

List of Subjects in 26 CFR 1.401–0 through 1.419(A)–2T

Bonds, Employee benefit plans, Income taxes, Reporting and recordkeeping requirements, Securities, Trusts and Trustees.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority citation for part 1 continues to read, in part, as follows:

Authority: Sec. 7805, 68A Stat. 917; 26 U.S.C. 7805 * * *

Par. 2. Section 1.401–4 is amended by revising the section heading and adding a paragraph (d) to read as follows:

§ 1.401–4 Discrimination as to contributions or benefits (before 1992).

* * * * *

(d) The provisions of this section do not apply to plan years beginning on or after January 1, 1992. For rules applicable to plan years beginning on or after January 1, 1992, see §§ 1.401(a)(4)–1 through 1.401(a)(4)–13.

Par. 3. Section 1.401(a)–4 is amended by revising the section heading, A–2(a)(2)(ii), Q–6, and A–6(a) to read as follows:

§ 1.401(a)–4 Optional forms of benefit (before 1992).

* * * * *

A–2: (a) * * *

(2) * * *

(ii) *Plan years commencing on or after TRA '86 effective date.* Except as provided in paragraph (a)(2)(iii) of this Q&A–2, for plan years commencing on or after the effective date on which the amendments made to section 410(b) by section 1112(a) of TRA '86 first apply to a plan, the requirement of this paragraph (a)(2) is satisfied only if the group of employees to whom the optional form is currently available satisfies either the percentage test set forth in section 410(b)(1)(A), the ratio test set forth in section 410(b)(1)(B), or the nondiscriminatory classification test set forth in section 410(b)(2)(A)(i). The employer need not satisfy the average benefit percentage test in section 410(b)(2)(A)(ii) in order for the optional form to be currently available to a nondiscriminatory group of employees.

* * * * *

Q–6: For what period are the rules of this section effective?

A–6: (a) *General effective date.* Except as otherwise provided in this section, the provisions of this section are effective January 30, 1986. The provisions of this section do not apply to plan years beginning on or after January 1, 1992. For rules applicable to plan years beginning on or after January 1, 1992, see §§ 1.401(a)(4)–1 through 1.401(a)(4)–13.

Par. 4. New §§ 1.401(a)(4)–0 through 1.401(a)(4)–13 are added at the appropriate place to read as follows:

§ 1.401(a)(4)–0 Table of contents.

This section contains a listing of the headings §§ 1.401(a)(4)–1 through 1.401(a)(4)–13.

§ 1.401(a)(4)–1 Nondiscrimination requirements of section 401(a)(4).

§ 1.401(a)(4)–2 Nondiscrimination in amount of contributions under a defined contribution plan.

§ 1.401(a)(4)–3 Nondiscrimination in amount of benefits under a defined benefit plan.

§ 1.401(a)(4)–(4) Nondiscriminatory availability of benefits, rights, and features.

§ 1.401(a)(4)–5 Plan amendments and plan terminations.

§ 1.401(a)(4)–6 Contributory defined benefit plans.

§ 1.401(a)(4)–7 Imputation of permitted disparity.

§ 1.401(a)(4)–8 Cross-testing.

§ 1.401(a)(4)–9 Plan aggregation and restructuring.

§ 1.401(a)(4)-1 Nondiscrimination requirements of section 401(a)(4).

(a) *In general.* Section 401(a)(4) provides that a plan is a qualified plan only if the contributions or the benefits provided under the plan do not discriminate in favor of highly compensated employees. Whether a plan satisfies this requirement depends on the form of the plan and on its effect in operation. In making this determination, intent is irrelevant. This section sets forth the exclusive rules for determining whether a plan satisfies section 401(a)(4). A plan that complies in form and operation with the rules in this section therefore satisfies section 401(a)(4).

(b) *Requirements a plan must satisfy*—(1) *In general.* In order to satisfy section 401(a)(4), a plan must satisfy the requirements of paragraphs (b)(2) through (b)(4) of this section.

(2) *Nondiscrimination in amount of contributions or benefits*—(i) *In general.* Either the contributions or the benefits provided under the plan must be nondiscriminatory in amount. It need not be shown that both the contributions and the benefits provided are nondiscriminatory in amount, but only that either the contributions alone or the benefits alone are nondiscriminatory in amount.

(ii) *Defined contribution plans.* A defined contribution plan generally satisfies this paragraph (b)(2) if the contributions allocated under the plan (including forfeitures) are nondiscriminatory in amount under § 1.401(a)(4)-2. Alternatively, a defined contribution plan (other than an ESOP, a section 401(k) plan, or a section 401(m) plan) satisfies this paragraph (b)(2) if the equivalent benefits provided under the plan are nondiscriminatory in amount under § 1.401(a)(4)-8(b). These latter rules include a safe harbor testing method for contributions provided under a target benefit plan.

(iii) *Defined benefit plans.* A defined benefit plan generally satisfies this paragraph (b)(2) if the benefits provided under the plan are nondiscriminatory in amount under § 1.401(a)(4)-3. Alternatively, a defined benefit plan satisfies this paragraph (b)(2) if the equivalent allocations provided under the plan are nondiscriminatory in amount under § 1.401(a)(4)-8(c). These latter rules include a safe harbor testing method for benefits provided under a cash balance plan. In addition, § 1.401(a)(4)-8(d) provides a safe harbor testing method for benefits provided under a defined benefit plan that is part of a floor-offset arrangement.

(iv) *Permitted disparity.* In determining whether the contributions or benefits provided under a plan are nondiscriminatory in amount, the disparity permitted under section 401(l) may be taken into account, both by plans that satisfy section 401(l) in form and by those that do not. A plan that satisfies section 401(l) in form may be able to satisfy certain design-based safe harbors under §§ 1.401(a)(4)-2, 1.401(a)(4)-3, and 1.401(a)(4)-8. Alternatively, a plan may be able to satisfy the general tests in §§ 1.401(a)(4)-2, 1.401(a)(4)-3, and 1.401(a)(4)-8 by imputing the disparity permitted under section 401(l) on an employee-by-employee basis, even in the case of a plan that does not satisfy section 401(l) in form. Rules for taking into account the disparity permitted under section 401(l) are set forth in §§ 1.401(a)(4)-2, 1.401(a)(4)-3, 1.401(a)(4)-7, 1.401(a)(4)-8, and 1.401(a)(4)-9. In no event may these rules be used by a plan to which sections 401(a)(5)(C) and 401(l) are not available.

(3) *Nondiscriminatory availability of benefits, rights, and features.* The benefits, rights, and features provided under the plan must be made available to employees in the plan in a nondiscriminatory manner. The benefits, rights, and features subject to this requirement are all optional forms of benefit, ancillary benefits, and other rights and features available to any employee under the plan. Rules for determining whether the requirement of this paragraph (b)(3) is met are set forth in §§ 1.401(a)(4)-4 and 1.401(a)(4)-9.

(4) *Nondiscriminatory effect of plan amendments and terminations.* The effect of plan amendments (including plan amendments granting past service credit) and plan terminations must be nondiscriminatory. Rules for determining whether the requirement of this paragraph (b)(4) is met are set forth in § 1.401(a)(4)-5.

(c) *Application of requirements*—(1) *In general.* The requirements of paragraph (b) of this section must be applied in accordance with the rules set forth in this paragraph (c).

(2) *Interpretation.* The provisions of §§ 1.401(a)(4)-1 through 1.401(a)(4)-13 must be interpreted in a reasonable manner consistent with the purpose of preventing discrimination in favor of highly compensated employees.

(3) *Former employees.* In applying the nondiscriminatory amount and availability requirements of paragraphs (b)(2) and (b)(3) of this section, former employees are tested separately from active employees unless otherwise provided. Rules for applying the requirements of paragraphs (b)(2) and (b)(3) of this section to former employees are set forth in § 1.401(a)(4)-10.

(4) *Employee-provided contributions and benefits.* In applying the nondiscriminatory amount requirement of paragraph (b)(2) of this section, employee-provided contributions and benefits are tested separately from employer-provided contributions and benefits, unless otherwise provided. Rules for applying the requirements of paragraph (b)(2) of this section to employee contributions allocated to separate accounts are set forth in § 1.401(a)(4)-2(d)(2). Rules for determining the amount of employer-provided benefits under a defined benefit plan that includes employee contributions not allocated to separate accounts are set forth in § 1.401(a)(4)-6(b), and rules for applying the requirements of paragraph (b)(2) of this section to employee contributions under such a plan are set forth in § 1.401(a)(4)-6(c).

(5) *Plans providing section 401(h) benefits.* In applying the requirements of paragraph (b) of this section, the portion of a plan providing benefits described in section 401(h) is tested separately from the portion of the same plan providing retirement benefits. Rules applicable to plans providing section 401(h) benefits are set forth in § 1.401-14(b)(2).

(6) *Collectively bargained plans.* The requirements of paragraph (b) of this section are treated as satisfied by a collectively bargained plan that automatically satisfies section 410(b) under § 1.410(b)-2(b)(7). This rule applies even if the collectively bargained plan is also a governmental plan within the meaning of section 414(d) that is subject to section 410(c). See § 1.410(b)-2(e).

(7) *Employee stock ownership plans.* [Reserved]

(8) *Scope of plan subject to testing*—(i) *Relationship with section 410(b).* To be a qualified plan, a plan must satisfy both sections 410(b) and 401(a)(4). Section 410(b) requires that a plan benefit a nondiscriminatory group of employees, and section 401(a)(4) requires that the contributions or benefits provided to employees benefiting under the plan not discriminate in favor of those employees who are highly compensated. Consistent with this requirement, the definition of a plan subject to testing under section 401(a)(4) is the same as the definition of a plan subject to testing under section 410(b), i.e., the plan determined after applying the mandatory disaggregation rules of § 1.410(b)-7(c) and the permissive aggregation rules of § 1.410(b)-7(d). In addition, whichever

testing option is used for the plan year under § 1.410(b)–8(a) must also be used for purposes of applying section 401(a)(4) to the plan for the plan year.

(ii) *Special rules for certain aggregated plans.* Special rules are set forth in § 1.401(a)(4)–9(b) for testing a plan that includes one or more defined benefit plans and one or more defined contribution plans that have been permissively aggregated under § 1.410(b)–7(d). By contrast, an aggregated plan that includes only defined benefit plans or only defined contribution plans is tested exclusively under the rules applicable to a single plan without regard to the special rules in § 1.401(a)(4)–9(b).

(iii) *Restructuring.* In certain circumstances, a plan may be restructured on the basis of employee groups and treated as comprising two or more plans, each of which is treated as a separate plan that must independently satisfy sections 401(a)(4) and 410(b). In effect, restructuring permits a plan that might otherwise fail to satisfy section 401(a)(4) as a single plan to demonstrate compliance with section 401(a)(4) based on the components of the plan, if those components separately satisfy section 410(b). Rules relating to restructuring plans for purposes of applying the requirements of paragraph (b) of this section are set forth in § 1.401(a)(4)–9(c).

(iv) *Reference to section 410(b) includes section 410(c).* In the case of a plan described in section 410(c)(1), a reference to section 410(c)(2) may be substituted for any reference to section 410(b) in §§ 1.401(a)(4)–1 through 1.401(a)(4)–13. The preceding sentence does not apply to a plan that has made the election provided in section 410(d) or that is subject to section 403(b)(12)(A)(i).

(9) *Plan year basis of testing*—(i) *In general.* The requirements of paragraph (b) of this section are generally applied on the basis of the plan year. Thus, unless otherwise provided, the compensation, contributions, benefit accruals, and other items used to apply these requirements must be determined with respect to the plan year being tested.

(ii) *Retroactive correction.* In accordance with paragraph (c)(9)(i) of this section, the requirements of paragraph (b) of this section are generally applied on the basis of the terms of the plan in effect during the plan year. However, § 1.401(a)(4)–11(g) provides rules allowing a plan to be retroactively amended after the close of the plan year to satisfy certain requirements under paragraph (b) of this section.

(10) *Rollovers and transfers.* In applying the requirements of paragraph (b) of this section, rollover contributions described in section 402(a)(5), 403(a)(4), or 408(d)(3), elective transfers described in Q&A–3(b) of § 1.411(d)–4, and transfers of assets and liabilities described in section 414(l) are treated in accordance with the rules set forth in § 1.401(a)(4)–11(b).

(11) *Vesting.* Notwithstanding any other provision in the regulations, a plan does not satisfy the nondiscriminatory amount requirement of paragraph (b)(2) of this section if the manner in which employees vest in their accrued benefits under the plan discriminates in favor of highly compensated employees. Rules for making this determination are set forth in § 1.401(a)(4)–11(c).

(12) *Crediting service.* Notwithstanding any other provision in the regulations, a plan does not satisfy the nondiscriminatory amount requirement of paragraph (b)(2) of this section if the manner in which employees' service is credited under the plan discriminates in favor of highly compensated employees. Rules for making this determination are set forth in § 1.401(a)(4)–11(d).

(13) *Governmental plans.* The rules of this section apply to a governmental plan within the meaning of section 414(d), except as provided in §§ 1.401(a)(4)–11(f) and 1.401(a)(4)–13(b).

(14) *Allocation of earnings.* Notwithstanding any other provision in the regulations, a defined contribution plan does not satisfy the nondiscriminatory amount requirement of paragraph (b)(2) of this section if the manner in which income, expenses, gains, or losses are allocated to employee accounts under the plan discriminates in favor of highly compensated employees.

(15) *Definitions.* In applying the requirements of this section, the definitions set forth in § 1.401(a)(4)–12 govern, unless otherwise provided.

(16) *Effective dates and fresh-start rules.* In applying the requirements of this section, the effective dates set forth in § 1.401(a)(4)-13 govern. Section 1.401(a)(4)–13 also provides certain transition and fresh-start rules that apply for purposes of this section.

(d) *Additional rules.* The Commissioner may, in revenue rulings, notices, and other guidance of general applicability, provide any additional rules that may be necessary or appropriate in applying the nondiscrimination requirements of section 401(a)(4).

§ 1.401(a)(4)–2 Nondiscrimination in amount of contributions under a defined contribution plan.

(a) *Introduction*—(1) *General rule.* The amount of contributions under a defined contribution plan for a plan year does not discriminate in favor of highly compensated employees if the plan satisfies the requirements of this section for the plan year.

(2) *Overview.* This section sets forth rules for determining whether the contributions under a defined contribution plan are nondiscriminatory in amount. Certain defined contribution plans that provide uniform allocations are permitted to satisfy the requirements of this section by meeting one of the safe harbor tests in paragraph (b) of this section. Plans that do not satisfy one of these safe harbors generally may comply with the requirements of this section by satisfying the general test in paragraph (c) of this section. Paragraph (d) of this section sets forth the exclusive tests under which section 401(k) plans and section 401(m) plans must satisfy the requirements of this section.

(3) *Alternative methods of satisfying nondiscriminatory amount requirement.* A plan (other than a section 401(k) plan or a section 401(m) plan) is permitted to satisfy either of the tests in paragraph (b)(3) or (c) of this section on a restructured basis pursuant to § 1.401(a)(4)–9(c). Alternatively, a plan (other than an ESOP, a section 401(k) plan, or a section 401(m) plan) is permitted to satisfy the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2) on the basis of equivalent benefits pursuant to § 1.401(a)(4)–8(b). These latter rules include a safe harbor testing method for contributions provided under a target benefit plan.

(4) *Separate testing of employer and employee contributions.* In applying the requirements of this section, employer contributions are tested separately from employee contributions, except as specifically provided for section 401(m) plans in §§ 1.401(m)–1 and 1.401(m)–2. To satisfy the requirements of this section, employer contributions must meet one of the tests set forth in paragraph (b), (c), or (d) of this section. Employee contributions under a section 401(m) plan must satisfy the requirements in paragraph (d)(2) of this section.

(b) *Safe harbors*—(1) *In general.* A defined contribution plan satisfies the requirements of this section for a plan year if the plan satisfies the uniformity requirements of paragraph (b)(2) of this section and either of the safe harbors in

paragraphs (b)(3) and (b)(4) of this section. Paragraph (b)(5) of this section provides exceptions for certain plan provisions that do not cause a plan to fail the requirements of this paragraph (b).

(2) *Uniformity requirements*—(i) *In general.* A plan satisfies the uniformity requirements of this paragraph (b)(2) only if it satisfies each of the requirements in paragraphs (b)(2)(ii) and (b)(2)(iii) of this section.

(ii) *Uniform normal retirement age and allocation formula.* The same uniform normal retirement age and the same allocation formula must apply to all employees in the plan.

(iii) *Uniform vesting and service crediting.* All employees in the plan must be subject to the same vesting schedule and the same definition of years of service. For purposes of crediting service, only service with the employer (or a predecessor employer within the meaning of section 414(a)) may be taken into account.

(3) *Safe harbor for plans with uniform allocation formula.* A plan satisfies the safe harbor in this paragraph (b)(3) for a plan year if the plan allocates all amounts taken into account under paragraph (c)(2)(ii) of this section for the plan year under a formula that allocates the same percentage of plan year compensation or the same dollar amount to every employee in the plan.

(4) *Safe harbor for uniform points plans*—(i) *In general.* A plan satisfies the safe harbor in this paragraph (b)(4) for a plan year if it satisfies each of the following requirements—

(A) The plan is a uniform points plan. A uniform points plan is a plan (other than an ESOP) under which each employee's allocation for the plan year equals the product determined by multiplying all amounts allocated or treated as allocated to all employees in the plan for the plan year (to the extent such amounts are taken into account under paragraph (c)(2)(ii) of this section) by a fraction, the numerator of which is the employee's points for the plan year, and the denominator of which is the sum of the points of all employees in the plan for the plan year. For this purpose, an employee's points for the plan year equal the sum of the employee's points for age, service, and units of plan year compensation for the plan year. Under a uniform points plan, each employee in the plan must receive the same number of points for each year of age, the same number of points for each year of service, and the same number of points for each unit of plan year compensation. The unit of plan year compensation used in the allocation formula must be the same for all employees in the plan and must be a single dollar amount that does not exceed $200. A uniform points plan need not grant points for both age and service, but it must grant points for at least one of them. If the plan grants points for years of service, the plan is permitted to limit the number of years of service taken into account to a single maximum number of years of service. In all cases, a uniform points plan must grant points for plan year compensation.

(B) For the plan year, the average of the allocation rates for the highly compensated employees in the plan does not exceed the average of the allocation rates for the nonhighly compensated employees in the plan. For this purpose, allocation rates are determined in accordance with paragraph (c) of this section, without imputing permitted disparity under paragraph (c)(2)(iv) of this section and § 1.401(a)(4)–7, and without grouping allocation rates under paragraphs (c)(2)(v) of this section.

(ii) *Example.* The following example illustrates the safe harbor in this paragraph (b)(4).

Example. (a) Plan A has a single allocation formula that applies to all employees in the plan, and under which each employee's allocation for the plan year equals the product determined by multiplying all amounts taken into account for all employees in the plan for the plan year under paragraph (c)(2)(ii) of this section by a fraction, the numerator of which is the employee's points for the plan year, and the denominator of which is the sum of the points of all employees in the plan for the plan year. Plan A grants each employee 10 points for each year of service and 1 point for each $100 of plan year compensation. For the 1994 plan year, the total allocations are $81,200, and the total points for all employees in the plan are 8,120. Each employee's allocation for the 1994 plan year is set forth in the table below.

Employee	Years of service	Plan year compensation	Points	Amount of allocation	Allocation rate (percent)
H1	20	$200,000	2,200	22,000	11.0
H2	10	200,000	2,100	21,000	10.5
H3	30	100,000	1,300	13,000	13.0
H4	3	100,000	1,030	10,300	10.3
N1	10	40,000	500	5,000	12.5
N2	5	35,000	400	4,000	11.4
N3	3	30,000	330	3,300	11.0
N4	1	25,000	260	2,600	10.4
Total			8,120	81,200	

(b) Under these facts, for the 1994 plan year Plan A is a uniform points plan within the meaning of paragraph (b)(4)(i)(A) of this section.

(c) For the 1994 plan year, the average allocation rate for the highly compensated employees in the plan (H1 through H4) is 11.2 percent, and the average allocation rate for nonhighly compensated employees in the plan (N1 through N4) is 11.3 percent. Because the average of the allocation rates for the highly compensated employees in the plan does not exceed the average of the allocation rates for the nonhighly compensated employees in the plan, Plan A satisfies paragraph (b)(4)(i)(B) of this section and, thus, the safe harbor in this paragraph (b)(4) for the 1994 plan year.

(5) *Use of safe harbors not precluded by certain plan provisions*—(i) *In general.* A plan does not fail to satisfy the requirements of this paragraph (b) merely because the plan contains one or more of the provisions described in this paragraph (b)(5). Unless otherwise provided, the provision must apply uniformly to all employees in the plan.

(ii) *Section 401(l) permitted disparity.* The plan takes permitted disparity into account in a manner that satisfies section 401(l) in form. Thus, differences in employees' allocations under the plan attributable to disparities permitted under § 1.401(l)–2 (including differences in disparities that are deemed uniform under § 1.401(l)–2(c)(2)) do not cause a plan to fail to satisfy the requirements of this paragraph (b). This paragraph (b)(5)(ii) applies solely for purposes of the uniform allocation safe harbor in paragraph (b)(3) of this section.

(iii) *Entry dates.* The plan provides one or more entry dates during the plan year as permitted by section 410(a)(4).

(iv) *Prior vesting schedules.* The plan provides different vesting schedules

solely to the extent necessary to comply with section 411(a)(10) (relating to changes in vesting schedules).

(v) *Certain conditions on allocations.* The plan provides that an employee's allocation for the plan year is conditioned on the employee's employment on the last day of the plan year or on the employee's completion of a minimum number of hours of service during the plan year (not to exceed 1,000). Such a provision may include an exception for all employees who terminate employment during the plan year or only for those employees who terminate employment during the plan year on account of one or more of the following circumstances: retirement, disability, death, or military service.

(vi) *Certain limits on allocations.* The plan limits allocations otherwise provided under the allocation formula to a maximum dollar amount or a maximum percentage of plan year compensation, or limits the dollar amount of plan year compensation taken into account in determining the amount of allocations. The plan may apply these limits solely to all highly compensated employees in the plan.

(vii) *Dollar allocation per uniform unit of service.* The plan determines allocations based on the same dollar amount for each uniform unit of service (not to exceed 1 week) performed by each employee in the plan during the plan year. This paragraph (b)(5)(vii) applies solely for purposes of the uniform allocation safe harbor in paragraph (b)(3) of this section.

(viii) *Section 409(n) limits.* The plan limits allocations to employees in accordance with section 409(n) (or section 1042(b)(3) of the Internal Revenue Code of 1954 as in effect immediately prior to the Tax Reform Act of 1986).

(ix) *Section 415 limits.* The plan limits allocations to employees in accordance with section 415.

(x) *Multiple definitions of service*—(A) *In general.* The plan provides different definitions of years of service for different purposes under the plan, provided that, for each purpose, the same definition of years of service applies to all employees in the plan. Thus, for example, the plan may define years of service for purposes of vesting as all years of service in which the employee has completed at least 500 hours of service, and for purposes of eligibility for plan participation as all years of service in which the employee has completed at least 1,000 hours of service.

(B) *Hour-of-service equivalencies.* The plan credits service for a specific purpose for some employees (e.g., hourly employees) based on hours of service as provided for in 29 CFR 2530.200b–2, but credits service for the same purpose for other employees (e.g., salaried employees) based on one of the equivalencies set forth in 29 CFR 2530.200b–3.

(C) *Recognition of prior employment for eligibility and vesting.* The plan credits service for purposes of eligibility or vesting, or both, for service with a prior employer. This rule applies solely to employees who become employees of the employer pursuant to a transaction between the employer and the prior employer that is a stock or asset acquisition, a merger, or other similar transaction involving a change in the employer of the employees of a trade or business.

(D) *Imputed service.* The plan credits imputed service as permitted under § 1.401(a)(4)–11(d)(2).

(xi) *Multiple formulas*—(A) *In general.* The plan provides that an employee's allocation under the plan is the greater of the allocations determined under two or more formulas. Alternatively, the plan provides that an employee's allocation under the plan is the sum of the allocations determined under two or more formulas. This paragraph (b)(5)(xi) does not apply to a plan unless each of the formulas under the plan satisfies the requirements of paragraphs (b)(5)(xi) (B) through (D) of this section. See § 1.401(l)–5(b)(8)(ii) for rules regarding the overall permitted disparity limitations.

(B) *Sole formulas.* The formulas are the only formulas under the plan.

(C) *Separate testing.* Each of the formulas separately satisfies the uniformity requirements of paragraph (b)(2) of this section and also separately satisfies either of the safe harbors in paragraphs (b)(3) and (b)(4) of this section. For this purpose, the formulas need not satisfy the same safe harbor. In addition, a formula that is available solely to some or all nonhighly compensated employees in the plan is deemed to satisfy this paragraph (b)(5)(xi)(C).

(D) *Availability*—*(1) General rule.* All of the formulas are available on the same terms to all employees in the plan.

(2) Formulas for nonhighly compensated employees. A formula does not fail to be available on the same terms to all employees in the plan, merely because the formula is available solely to some or all nonhighly compensated employees in the plan on the same terms as all the other formulas in the plan.

(3) Top-heavy formulas. In the case of a plan that provides the greater of the allocations under two or more formulas, one of which is a top-heavy formula, the top-heavy formula does not fail to be available on the same terms to all employees in the plan, merely because the formula is available solely to all non-key employees in the plan on the same terms as all the other formulas under the plan. Furthermore, the top-heavy formula does not fail to be available on the same terms as the other formulas under the plan, merely because the top-heavy formula is conditioned on the plan's being top-heavy within the meaning of section 416(g). Finally, the top-heavy formula does not fail to be available on the same terms as the other formulas under the plan, merely because the top-heavy formula is available to all employees described in § 1.416–1, Q&A M–10 (i.e., all non-key employees who have not separated from service as of the last day of the plan year). The preceding sentence does not apply, however, unless the plan would satisfy section 410(b) if all employees whose only allocation under the plan is provided under the top-heavy formula were treated as not currently benefiting under the plan. For purposes of this paragraph (b)(5)(xi)(D)*(3)*, a top-heavy formula is a formula that provides the minimum benefit described in section 416(c)(2) (taking into account, if applicable, the modification in section 416(h)(2)(A)(ii)(II)).

(E) *Provisions may be applied more than once.* The provisions of this paragraph (b)(5)(xi) may be applied more than once. For example, a plan satisfies the requirements of this paragraph (b) if an employee's allocation under the plan is the greater of the allocations under two or more formulas, and one or more of those formulas is the sum of the allocations under two or more other formulas, provided that each of the formulas under the plan satisfies the requirements of paragraphs (b)(5)(xi) (B) through (D) of this section.

(F) *Examples.* The following examples illustrate the rules regarding multiple formulas in this paragraph (b)(5)(xi).

Example 1. Under Plan A, each employee's allocation equals the sum of the allocations determined under two formulas. The first formula provides an allocation of 5 percent of plan year compensation. The second formula provides an allocation of $100. Plan A is eligible to apply the rules in this paragraph (b)(5)(xi).

Example 2. Under Plan B, each employee's allocation equals the greater of the allocations determined under two formulas. The first formula provides an allocation of 7 percent of plan year compensation and is available to all employees in the plan who complete at least 1,000 hours of service during the plan year and who have not

separated from service as of the last day of the plan year. The second formula is a top-heavy formula that provides an allocation of 3 percent of plan year compensation (determined using section 414(s) compensation as defined in § 1.414(s)-1(c)(2)), and that is available to all employees described in § 1.416-1, Q&A M-10. Plan B does not satisfy the general rule in paragraph (b)(5)(xi)(D)(*1*) of this section because the two formulas are not available on the same terms to all employees in the plan (i.e., an employee is required to complete 1,000 hours of service during the plan year to receive an allocation under the first formula, but not under the second formula). Nonetheless, because the second formula is a top-heavy formula, the special availability rules for top-heavy formulas in paragraph (b)(5)(xi)(D)(*3*) of this section apply. Thus, the second formula does not fail to be available on the same terms as the first formula, merely because the second formula is available to all employees described in § 1.416-1, Q&A M-10, as long as the plan would satisfy section 410(b) if all employees whose only allocation under the plan is provided under the second formula were treated as not currently benefiting under the plan. This is true, even if the plan conditions the availability of the second formula on the plan's being top-heavy for the plan year.

Example 3. The facts are the same as in *Example 2*, except that the first formula is available to all employees who have not separated from service as of the last day of the plan year, regardless of whether they complete at least 1,000 hours of service during the plan year. Plan B still does not satisfy the general rule in paragraph (b)(5)(xi)(D)(*1*) of this section because the two formulas are not available on the same terms to all employees in the plan (i.e., the second formula is only available to all non-key employees in the plan). Nonetheless, because the second formula is a top-heavy formula, the special availability rules for top-heavy formulas in paragraph (b)(5)(xi)(D)(*3*) of this section apply. Thus, the second formula does not fail to be available on the same terms as the first formula, merely because the second formula is available solely to all non-key employees in the plan.

(c) *General test for nondiscrimination in amount of contributions*—(1) *In general.* A plan satisfies the requirements of this section for a plan year if each rate group under the plan satisfies section 410(b). For purposes of this paragraph (c), a rate group exists under a plan for each highly compensated employee in the plan and consists of the highly compensated employee and all other employees in the plan (both highly and nonhighly compensated) who have an allocation rate greater than or equal to the highly compensated employee's allocation rate. Thus, an employee is in the rate group for each highly compensated employee in the plan who has an allocation rate less than or equal to the employee's allocation rate.

(2) *Determination of allocation rates*—(i) *In general.* The allocation rate for an employee for a plan year equals the sum of the allocations to the employee's account for the plan year, expressed either as a percentage of plan year compensation or as a dollar amount.

(ii) *Allocations taken into account.* The amounts taken into account in determining allocation rates for a plan year include all employer contributions and forfeitures that are allocated or treated as allocated to the account of an employee under the plan for the plan year, other than amounts described in paragraph (c)(2)(iii) of this section. For this purpose, employer contributions include annual additions described in § 1.415-6(b)(2)(i) (regarding amounts arising from certain transactions between the plan and the employer). In the case of a defined contribution plan subject to section 412, the amount of employer contributions taken into account is the amount of employer contributions required to be allocated under the plan to the employee's account for the plan year, even if all or part of the required contribution is not actually made. For purposes of this paragraph (c)(2)(ii), amounts that would be allocated to the account of an employee for the plan year but for the limits of section 415 are not treated as allocated to the account of the employee. However, amounts that would be allocated to the account of an employee for the plan year but for the limits of section 409(n) (or section 1042(b)(3) of the Internal Revenue Code of 1954 as in effect immediately prior to the Tax Reform Act of 1986) are treated as allocated to the account of the employee.

(iii) *Allocations not taken into account.* Allocations of earnings, expenses, gains, and losses attributable to the balance in an employee's account are not taken into account in determining allocation rates.

(iv) *Imputation of permitted disparity.* The disparity permitted under section 401(l) may be imputed in accordance with the rules of § 1.401(a)(4)-7.

(v) *Grouping of allocation rates.* An employer may treat all employees who have allocation rates within a range of no more than 5 percent (not 5 percentage points) above and below a midpoint rate chosen by the employer as having an allocation rate equal to that midpoint rate. If allocation rates are determined as a percentage of plan year compensation (rather than a dollar amount), an employer may, as an alternative, treat all employees who have allocation rates within a range of no more than one-quarter of a percentage point above and below a midpoint rate chosen by the employer as having an allocation rate equal to that midpoint rate. Allocation rates within a given range may be grouped under this paragraph (c)(2)(v) only if the allocation rates of highly and nonhighly compensated employees are dispersed throughout the range in a reasonably comparable manner and the range does not overlap with any other range chosen by the employer. An employer may choose to group the allocation rates of some employees into ranges and not to group the allocation rates of other employees into ranges, provided that the allocation rates of all employees within each range chosen by the employer are grouped within that range. If allocation rates are determined as a percentage of plan year compensation (rather than as dollar amount), an employer may apply either grouping method described in this paragraph (c)(2)(v) and, in addition, may apply one method to one group of employees and the other method to another group of employees, provided that only one method is applied to any given employee or group of employees.

(3) *Satisfaction of section 410(b) by a rate group*—(i) *In general.* For purposes of determining whether a rate group satisfies section 401(b), the rate group is treated as if it were a separate plan that benefits only the employees included in the rate group for the plan year. Except as provided in paragraphs (c)(3)(ii) through (v) of this section, the rules that apply in determining whether a rate group satisfies section 410(b) are the same as apply in determining whether a plan satisfies section 410(b). Thus, for example, if the rate group does not satisfy the ratio percentage test of § 1.410(b)-2(b)(2), the rate group must satisfy the average benefit test of § 1.410(b)-2(b)(3) (including the nondiscriminatory classification test of § 1.410(b)-4 and the average benefit percentage test of § 1.410(b)-5).

(ii) *Permissive aggregation not available.* The permissive aggregation rules of § 1.410(b)-7(d) are not available to a rate group in determining whether it satisfies section 410(b).

(iii) *Deemed satisfaction of reasonable classification requirement.* In determining whether a rate group satisfies the nondiscriminatory classification test of § 1.410(b)-4, the rate group is deemed to satisfy the reasonable classification requirement of § 1.410(b)-4(b).

(iv) *Facts-and-circumstances requirements replaced.* In determining whether a rate group satisfies the nondiscriminatory classification test of § 1.410(b)-4, the facts-and-

circumstances requirements of § 1.410(b)–4(c)(3) do not apply. Instead, the rate group is deemed to satisfy the facts-and-circumstances requirements of § 1.410(b)–4(c)(3), but only if the ratio percentage of the rate group is greater than or equal to the lesser of—

(A) The ratio percentage of the plan, or

(B) The midpoint between the safe and the unsafe harbor percentages applicable to the plan.

(v) *Application of average benefit percentage test.* A rate group satisfies the average benefit percentage test of § 1.410(b)–5 if the plan of which it is a part satisfies § 1.410(b)–5 (applied without regard to § 1.410(b)–5(f)). In the case of a plan that relies on § 1.410(b)–5(f) to satisfy the average benefit percentage test, each rate group under the plan satisfies the average benefit percentage test (if applicable) only if the rate group separately satisfies § 1.410(b)–5(f)).

(4) *Examples.* The following examples illustrate the general test in this paragraph (c).

Example 1. Employer X maintains 2 defined contribution plans, Plan A and Plan B, that are aggregated and treated as a single plan for purposes of sections 410(b) and 401(a)(4) pursuant to § 1.410(b)–7(d). For the 1994 plan year, Employee M has plan year compensation of $10,000 and receives an allocation of $200 under Plan A and an allocation of $800 under Plan B. Employee M's allocation rate under the aggregated plan for the 1994 plan year is 10 percent (i.e., $1,000 divided by $10,000).

Example 2. The employees in Plan C have the following allocation rates (expressed as percentage of plan year compensation): 9.6 percent, 9.7 percent, 9.8 percent, and 10.5 percent. Because all employees have allocation rates within a range of no more than 5 percent above and below 10.0 percent (a midpoint rate chosen by the employer), the employer may treat all employees as having an allocation rate of 10.0 percent (provided, of course, that the allocation rates of highly compensated employees and nonhighly compensated employees are dispersed throughout the range in a reasonably comparable manner).

Example 3. The employees in Plan D have the following allocation rates (expressed as a percentage of plan year compensation): 2.75 percent, 2.80 percent, 2.85 percent, 3.25 percent, 6.65 percent, 7.33 percent, 7.34 percent, and 7.35 percent. Because the first four rates are within a range of no more than one-quarter of a percentage point above and below 3.0 percent (a midpoint rate chosen by the employer), the employer may treat the employees who have those rates as having an allocation rate of 3.0 percent (provided that the allocation rates of highly compensated employees and nonhighly compensated employees are dispersed throughout the range in a reasonably comparable manner). Because the last four rates are within a range of no more than 5 percent above and below 7.0 percent (a midpoint rate chosen by the employer), the employer may treat the employees who have those rates as having an allocation rate of 7.0 percent (provided that the allocation rates of highly compensated employees and nonhighly compensated employees are dispersed throughout the range in a reasonably comparable manner).

Example 4. (a) Employer Y has only 6 nonexcludable employees, all of whom benefit under Plan E. The highly compensated employees in the plan are H1 and H2, and the nonhighly compensated employees in the plan are N1 through N4. For the 1994 plan year, H1 and N1 through N4 have an allocation rate of 5.0 percent of plan year compensation. For the same plan year, H2 has an allocation rate of 7.5 percent of plan year compensation.

(b) There are two rate groups under Plan E. Rate group 1 consists of H1 and all those employees in the plan who have an allocation rate greater than or equal to H1's allocation rate (5.0 percent). Thus, rate group 1 consists of H1, H2, and N1 through N4. Rate group 2 consists only of H2 because no other employee in the plan has an allocation rate greater than or equal to H2's allocation rate (7.5 percent).

(c) Rate group 2 does not satisfy the ratio percentage test under § 1.410(b)–2(b)(2) because the ratio percentage of the rate group is 0 percent—i.e., 0 percent (the percentage of all nonhighly compensated nonexcludable employees who are in the rate group) divided by 50 percent (the percentage of all highly compensated nonexcludable employees who are in the rate group).

(d) Rate group 2 also does not satisfy the nondiscriminatory classification test of § 1.410(b)–4 because the ratio percentage of the rate group (0 percent) is less than the unsafe harbor percentage applicable to the plan under § 1.410(b)–4(c)(4) (35.5 percent).

(e) Rate group 2 therefore does not satisfy 410(b) and, as a result, Plan E does not satisfy the requirements of paragraph (c) of this section. This is true even though rate group 1 satisfies the ratio percentage test of § 1.410(b)–2(b)(2).

Example 5. (a) The facts are the same as in *Example 4*, except that N4 has an allocation rate of 8.0 percent.

(b) There are 2 rate groups in Plan E. Rate group 1 consists of H1 and all those employees who have an allocation rate greater than or equal to H1's allocation rate (5.0 percent). Thus, rate group 1 consists of H1, H2 and N1 through N4. Rate group 2 consists of H2, and all those employees who have an allocation rate greater than or equal to H2's allocation rate (7.5 percent). Thus, rate group 2 consists of H2 and N4.

(c) Rate group 1 satisfies the ratio percentage test under § 1.410(b)–2(b)(2) because the ratio percentage of the rate group is 100 percent—i.e., 100 percent (the percentage of all nonhighly compensated nonexcludable employees who are in the rate group) divided by 100 percent (the percentage of all highly compensated nonexcludable employees who are in the rate group).

(d) Rate group 2 does not satisfy the ratio percentage test of § 1.410(b)–2(b)(2) because the ratio percentage of the rate group is 50 percent—i.e., 25 percent (the percentage of all nonhighly compensated nonexcludable employees who are in the rate group) divided by 50 percent (the percentage of all highly compensated nonexcludable employees who are in the rate group).

(e) However, rate group 2 does satisfy the nondiscriminatory classification test of § 1.410(b)–4 because the rate group is deemed to satisfy the reasonable classification requirement of § 1.410(b)–4(b) and the ratio percentage of the rate group (50 percent) is greater than the safe harbor percentage applicable to the plan under § 1.410(b)–4(c)(4) (45.5 percent).

(f) If rate group 2 satisfies the average benefit percentage test of § 1.410(b)–5, then rate group 2 satisfies section 410(b). In that case, Plan E satisfies the requirements of paragraph (c) of this section because each rate group under the plan satisfies section 410(b).

Example 6. (a) Plan F satisfies section 410(b) by satisfying the nondiscriminatory classification test of § 1.410(b)–4 and the average benefit percentage test of § 1.410(b)–5 (without regard to § 1.410(b)–5(f)). See § 1.410(b)–2(b)(3). Plan F utilizes the facts-and-circumstances requirements of § 1.410(b)–4(c)(3) to satisfy the nondiscriminatory classification test of § 1.410(b)–4. The safe and unsafe harbor percentages applicable to the plan under § 1.410(b)–4(c)(4) are 29 and 20 percent, respectively. Plan F has a ratio percentage of 22 percent.

(b) Rate group 1 under Plan F has a ratio percentage of 23 percent. Under paragraph (c)(3)(iii) of this section, the rate group is deemed to satisfy the reasonable classification requirement of § 1.410(b)–4(b). Even though the ratio percentage of the rate group (23 percent) falls below the safe harbor percentage applicable to the plan (29 percent), under paragraph (c)(3)(iv) of this section the rate group is deemed to satisfy the facts-and-circumstances requirements of § 1.410(b)–4(c)(3), because the ratio percentage for the rate group (23 percent) is greater than the lesser of—

(1) the ratio percentage for the plan as a whole (22 percent), and

(2) the midpoint between the safe and unsafe harbor percentages (24.5 percent).

Under these facts, the rate group satisfies the nondiscriminatory classification test of § 1.410(b)–4. In addition, under paragraph (c)(3)(v) of this section, the rate group satisfies section 410(b) because the plan satisfies the average benefit percentage test of § 1.410(b)–5.

(d) *Exclusive tests for section 401(k) and (m) plans*—(1) *Section 401(k) plans.* A section 401(k) plan is deemed to satisfy the requirements of this section.

(2) *Section 401(m) plans.* A section 401(m) plan satisfies the requirements of this section only if the plan satisfies §§ 1.401(m)–1(b)(1), 1.401(m)–1(b)(3), and 1.401(m)–2.

(3) *Scope of exclusive tests.* This paragraph (d) does not apply to contributions under a nonqualified cash or deferred arrangement, qualified

nonelective contributions treated as elective or matching contributions under §§ 1.401(k)–1(b)(5) and 1.401(m)–1(b)(5) (except to the extent provided in those sections), or elective contributions described in § 1.401(k)–1(b)(4)(iv) that fail to satisfy the allocation and compensation requirements of § 1.401(k)–1(b)(4)(i). Contributions described in the preceding sentence must satisfy the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2) without regard to the rules in paragraphs (d)(1) and (d)(2) of this section.

§ 1.401(a)(4)–3 Nondiscrimination in amount of benefits under a defined benefit plan.

(a) *Introduction*—(1) *General rule.* The amount of employer-provided benefits under a defined benefit plan does not discriminate in favor of highly compensated employees for a plan year if the plan satisfies the requirements of this section for the plan year.

(2) *Overview.* This section sets forth rules for determining whether the employer-provided benefits under a defined benefit plan are nondiscriminatory in amount. Certain defined benefit plans that provide uniform benefits are permitted to satisfy the requirements of this section by meeting one of the five safe harbor tests in paragraph (b) of this section. Four of these safe harbors are design-based and do not require the determination and comparison of actual benefits under the plan. Plans that do not provide uniform benefits in accordance with any of the safe harbors in paragraph (b) of this section may comply with the requirements of this section only by satisfying the general test in paragraph (c) of this section. The general test requires the determination of individual benefit accrual rates. Paragraph (d) of this section provides rules for determining these accrual rates. Paragraph (e) of this section provides rules for determining compensation for purposes of applying the tests in this section. Paragraph (f) of this section provides additional rules and exceptions that apply generally under this section, for purposes of both the safe harbor tests in paragraph (b) of this section and the general test in paragraph (c) of this section.

(3) *Alternative methods of satisfying nondiscriminatory amount requirement.* A defined benefit plan is permitted to satisfy any of the tests in paragraph (b) or (c) of this section on a restructured basis pursuant to § 1.401(a)(4)–9(c). In addition, a defined benefit plan that is part of a floor-offset arrangement is permitted to satisfy the requirements of this section pursuant to § 1.401(a)(4)–8(d). Alternatively, a defined benefit plan is permitted to satisfy the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2) on the basis of equivalent allocations pursuant to § 1.401(a)(4)–8(c). These latter rules include a safe harbor testing method for benefits provided under a cash balance plan.

(4) *Separate testing of employer-provided benefits and employee-provided benefits.* This section applies for purposes of determining whether the amount of employer-provided benefits under a defined plan satisfies the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2). In the case of a contributory DB plan (i.e., one that includes employee contributions not allocated to separate accounts), § 1.401(a)(4)–6(b) provides rules for determining the amount of employer-provided benefits under the plan, and § 1.401(a)(4)–6(c) provides rules for determining whether the employee-provided benefits under the plan satisfy the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2).

(b) *Safe harbors*—(1) *In general.* A defined benefit plan satisfies the requirements of this section for a plan year if the plan satisfies the uniformity requirements of paragraph (b)(2) of this section and any one of the safe harbors in paragraphs (b)(3) (unit credit plans), (b)(4) (unit credit fractional accrual plans), (b)(5) (flat benefit plans), (b)(6) (alternative safe harbor for flat benefit plans), and (b)(7) (insurance contract plans) of this section. Paragraph (b)(8) of this section provides exceptions for certain plan provisions that do not cause a plan to fail the requirements of this paragraph (b).

(2) *Uniformity requirements*—(i) *In general.* A plan satisfies the uniformity requirements of this paragraph (b)(2) only if it satisfies each of the requirements in paragraphs (b)(2)(ii) through (b)(2)(vi) of this section.

(ii) *Uniform normal retirement benefit.* The same benefit formula must apply to all employees in the plan. The benefit formula must provide all employees in the plan with an annual benefit payable in the same form commencing at the same uniform normal retirement age. The annual benefit must be the same percentage of average annual compensation or the same dollar amount for all employees in the plan who will have the same number of years of service at normal retirement age. The annual benefit must equal the employee's accrued benefit at normal retirement age (within the meaning of section 411(a)(7)(A)(i)) and must be the normal retirement benefit under the plan (within the meaning of section 411(a)(9)).

(iii) *Uniform post-normal retirement benefits.* With respect to an employee with a given number of years of service at any age after normal retirement age, the annual benefit commencing at the employee's age must be the same percentage of average annual compensation or the same dollar amount that would be payable commencing at normal retirement age to an employee who had that same number of years of service at normal retirement age.

(iv) *Uniform subsidies.* Each subsidized optional form of benefit under the plan must be available to substantially all employees in the plan. In determining whether a subsidized optional form of benefit is available to substantially all employees in the plan, the same criteria apply as in determining whether an optional form of benefits is currently available to a group of employees in the plan under § 1.401(a)(4)–4(b). An optional form of benefit is considered subsidized if the normalized optional form of benefit is larger than the normalized normal retirement benefit under the plan.

(v) *Uniform vesting and service crediting.* All employees in the plan must be subject to the same vesting schedule and the same definition of years of service for all purposes under the plan. For purposes of crediting service, only service with the employer (or a predecessor employer within the meaning of section 414(a)) may be taken into account.

(vi) *No employee contributions.* The plan is not a contributory DB plan.

(vii) *Examples.* The following examples illustrate the uniformity requirements in this paragraph (b)(2).

Example 1. Plan A provides a normal retirement benefit equal to 2 percent of average annual compensation times each year of service commencing at age 65 for all employees in the plan. Plan A provides that employees of Division A receive their benefit in the form of a straight life annuity and that employees of Division B receive their benefit in the form of a life annuity with an automatic cost-of-living increase. Plan A does not provide a uniform normal retirement benefit within the meaning of paragraph (b)(2)(ii) of this section because the annual benefit is not payable in the same form to all employees in the plan.

Example 2. Plan B provides a normal retirement benefit equal to 1.5 percent of average annual compensation times each year of service at normal retirement age for all employees in the plan. The normal retirement age under the plan is the earlier of age 65 or the age at which the employee completes 10 years of service, but in no event earlier than age 62. Plan B does not provide a uniform normal retirement benefit within the

meaning of paragraph (b)(2)(ii) of this section because the same uniform normal retirement age does not apply to all employees in the plan.

Example 3. Plan C is an accumulation plan under which the benefit for each year of service equals 1 percent of plan year compensation payable in the same form to all employees in the plan commencing at the same uniform normal retirement age. Under paragraph (b)(8)(x)(B) of this section, an accumulation plan does not fail to satisfy the requirements of this paragraph (b) merely because it substitutes plan year compensation for average annual compensation. Plan C provides a uniform normal retirement benefit within the meaning of paragraph (b)(2)(ii) of this section, because all employees in the plan with the same number of years of service at normal retirement age will receive an annual benefit that is treated as the same percentage of average annual compensation.

Example 4. The facts are the same as in *Example 3*, except that the benefit for each year of service equals 1 percent of plan year compensation increased by reference to the increase in the cost of living from the year of service to normal retirement age. Plan C does not provide a uniform normal retirement benefit, because the annual benefit defined by the benefit formula can vary for employees with the same number of years of service at normal retirement age, depending on the age at which those years of service were credited to the employee under the plan.

Example 5. Plan D provides a normal retirement benefit of 50 percent of average annual compensation at normal retirement age (age 65) for employees with 30 years of service at normal retirement age. Plan D provides that in the case of an employee with less than 30 years of service at normal retirement age, the normal retirement benefit is reduced on a pro rata basis for each year of service less than 30. However, if an employee with less than 30 years of service at normal retirement age continues to work past normal retirement age, Plan D provides that the additional years of service worked past normal retirement age are taken into account for purposes of the 30 years of service requirement. Thus, an employee who has 26 years of service at age 65 but who does not retire until age 69 with 30 years of service will receive a benefit of 50 percent of average annual compensation. Plan D provides uniform post-normal retirement benefits within the meaning of paragraph (b)(2)(iii) of this section.

Example 6. Plan E provides a normal retirement benefit payable in the form of a straight life annuity equal to 1 percent of average annual compensation per year of service. The normal retirement age under the plan is 65. Plan E also provides an optional form of benefit for employees who have at least 10 years of service and who have attained at least age 55. The optional form of benefit provides that for employees retiring before age 65, the normal retirement benefit is reduced by 5 percent for each year that commencement of benefits precedes age 65. Thus, the early retirement benefit at age 55, for example, is 50 percent of the normal retirement benefit. When normalized, this benefit is 131 percent of the normalized normal retirement benefit under the plan. The reduction factor of 5 percent therefore creates a subsidized early retirement benefit for purposes of paragraph (b)(2)(iv) of this section because the normalized early retirement benefit is larger than the normalized normal retirement benefit under the plan. In order to satisfy the uniform subsidies requirement of paragraph (b)(2)(iv) of this section, the early retirement benefit must be available to substantially all employees in the plan.

Example 7. Plan F is amended on February 14, 1994, to provide an early retirement window benefit that is a subsidized optional form of benefit under paragraph (b)(2)(iv) of this section. The early retirement window benefit is available only to employees who retire between June 1, 1994, and December 31, 1994. Paragraph (b)(2)(iv) of this section provides that, in determining whether a subsidized optional form of benefit is available to substantially all employees in the plan, the same criteria apply as in determining whether an optional form of benefit is currently available to a group of employees under § 1.401(a)(4)–4(b). Section 1.401(a)(4)–4(b) provides that age and service requirements are not disregarded in determining the current availability of an optional form of benefit if those requirements must be satisfied within a specified period of time. Thus, unless substantially all employees in the plan will satisfy the eligibility requirements for the early retirement window benefit by the close of the early retirement window benefit period, Plan F fails to satisfy the requirements of paragraph (b)(2)(iv) of this section. However, see § 1.401(a)(4)–9(c)(6), *Example 3*, for an example of how a plan with an early retirement window benefit may be restructured into two component plans, each of which satisfies the safe harbors of this paragraph (b).

(3) *Safe harbor for unit credit plans*—(i) *General rule.* A plan satisfies the safe harbor in this paragraph (b)(3) for a plan year if it satisfies each of the following requirements—

(A) The plan satisfies the 133⅓ percent accrual rule of section 411(b)(1)(B).

(B) An employee's accrued benefit under the plan as of any plan year is determined by applying the plan's benefit formula to the employee's years of service and (if applicable) average annual compensation, both determined as of that plan year. Thus, all employees in the plan who have the same number of years of service as of any plan year will have an accrued benefit that is the same percentage of average annual compensation or the same dollar amount.

(ii) *Examples.* The following examples illustrate the unit credit safe harbor in this paragraph (b)(3). In each example, it is assumed that the plan has never permitted employee contributions.

Example 1. Plan A provides that the accrued benefit of each employee in the plan as of any plan year equals 1.5 percent of the employee's average annual compensation times the employee's years of service determined as of that plan year. Plan A satisfies this paragraph (b)(3).

Example 2. Plan B provides that the accrued benefit of each employee in the plan as of any plan year equals the employee's average annual compensation times a percentage that depends on the employee's years of service determined as of that plan year. The percentage is 1.5 percent of each of the first 5 years of service, plus 1.75 percent for each of the next 5 years of service, plus 2 percent for all additional years of service. Plan B satisfies this paragraph (b)(3).

Example 3. Plan C provides that the accrued benefit of each employee in the plan as of any plan year equals the employee's average annual compensation times a percentage that depends on the employee's years of service determined as of that plan year. The percentage is 2 percent for each of the first 5 years of service, plus 1 percent for all additional years of service. Plan C satisfies this paragraph (b)(3).

(4) *Safe harbor for unit credit plans using fractional accrual rule*—(i) *General rule.* A plan satisfies the safe harbor in this paragraph (b)(4) for a plan year if it satisfies each of the following requirements—

(A) The plan satisfies the fractional accrual rule of section 411(b)(1)(C).

(B) An employee's accrued benefit under the plan as of any plan year before the employee reaches normal retirement age is determined by multiplying the employee's fractional rule benefit (within the meaning of § 1.411(b)–1(b)(3)(ii)(A)) by a fraction, the numerator of which is the employee's years of service determined as of the plan year, and the denominator of which is the employee's projected years of service as of normal retirement age. Thus, all employees in the plan who have the same entry age and the same number of years of service as of any plan year will have an accrued benefit at normal retirement age that is the same percentage of average annual compensation or the same dollar amount.

(C) Under the plan, it is impossible for any employee in the plan to accrue in a plan year a portion of the normal retirement or post-normal retirement benefit described in paragraph (b)(2) (ii) or (iii) of this section that is more than ⅓ larger than the portion of the same benefit accrued in that or any other plan year by any other employee in the plan, when each portion of the benefit is expressed as a percentage of each employee's average annual compensation or as a dollar amount. Solely for this purpose, employees with projected service at normal retirement age in excess of 33 years may be

disregarded. In addition, in the case of a section 401(l) plan, an employee is treated as accruing benefits at a rate equal to the excess benefit percentage in the case of a defined benefit excess plan, or at a rate equal to the gross benefit percentage in the case of an offset plan.

(ii) *Examples.* The following examples illustrate the unit credit fractional accrual safe harbor in this paragraph (b)(4). In each example, it is assumed that the plan has never permitted employee contributions.

Example 1. Plan A provides a normal retirement benefit equal to 1.6 percent of average annual compensation times each year of service up to 25. Plan A further provides that an employee's accrued benefit as of any plan year equals the employee's fractional rule benefit multiplied by a fraction, the numerator of which is the employee's years of service as of the plan year, and the denominator of which is the employee's projected years of service as of normal retirement age. The greatest benefit that an employee could accrue in any plan year is 1.6 percent of average annual compensation (this is the case for an employee in the plan with 25 or fewer years of projected service at normal retirement age). Among employees with 33 or fewer years of projected service at normal retirement age, the lowest benefit that an employee could accrue in any plan year is 1.212 percent of average annual compensation (this is the case for an employee in the plan with 33 years of projected service at normal retirement age). Plan A satisfies paragraph (b)(4)(i)(C) of this section because 1.6 percent is not more than ⅓ larger than 1.212 percent.

Example 2. Plan B is a section 401(l) plan that provides a normal retirement benefit equal to 1.0 percent of average annual compensation up to the integration level, and 1.6 percent of average annual compensation above the integration level, times each year of service up to 36. Plan B further provides that an employee's accrued benefit as of any plan year equals the employee's fractional rule benefit multiplied by a fraction, the numerator of which is the employee's years of service as of the plan year, and the denominator of which is the employee's projected years of service as of normal retirement age. For purposes of satisfying the ⅓ larger rule in paragraph (b)(4)(i)(C) of this section, all employees in the plan are assumed to accrue benefits at the rate of 1.6 percent of average annual compensation (the excess benefit percentage under the plan). Plan B satisfies the requirements of paragraph (b)(4)(i)(C) of this section because all employees with 33 or fewer years of projected service at normal retirement age accrue in each plan year a benefit of 1.6 percentage of average annual compensation.

Example 3. Plan C provides a normal retirement benefit equal to 4 percent of average annual compensation times each year of service up to 10 and 1 percent of average annual compensation times each year of service in excess of 10 and not in excess of 30. Plan C further provides that an employee's accrued benefit as of any plan year equals the employee's fractional rule benefit multiplied by a fraction, the numerator of which is employee's years of service as of the plan year, and the denominator of which is the employee's projected years of service as of normal retirement age. The greatest benefit that an employee could accrue in any plan year is 4 percent of average annual compensation (this is the case for an employee with 10 or fewer years of projected service at normal retirement age). Among employees with 33 or fewer years of projected service at normal retirement age, the lowest benefit that an employee could accrue in a plan year is 1.82 percent of average annual compensation (this is the case of an employee with 33 years of projected service at normal retirement age). Plan C fails to satisfy this paragraph (b)(4) because 4 percent is more than ⅓ larger than 1.82 percent.

Example 4. Plan D is a section 401(l) plan that provides a normal retirement benefit equal to 2.0 percent of average annual compensation, plus 0.65 percent of average annual compensation above covered compensation, for each year of service up to 25. Plan D further provides that an employee's accrued benefit as of any plan year equals the sum of—

(1) The employee's fractional rule benefit (determined as if the normal retirement benefit under the plan equaled 2.0 percent of average annual compensation for each year of service up to 25) multiplied by a fraction, the numerator of which is the employee's years of service as of the plan year, and the denominator of which is the employee's projected years of service as of normal retirement age, plus

(2) 0.65 percent of the employee's average annual compensation above covered compensation multiplied by the employee's years of service (up to 25) as of the current plan year.

Although Plan D satisfies the fractional accrual rule of section 411(b)(1)(C), the plan fails to satisfy this paragraph (b)(4) because the plan does not determine employees' accrued benefits in accordance with paragraph (b)(4)(i)(B) of this section.

(5) *Safe harbor for flat benefit plans*—(i) *General rule.* A plan satisfies the safe harbor in this paragraph (b)(5) for a plan year if it satisfies each of the following requirements—

(A) The plan satisfies the fractional accrual rule of section 411(b)(1)(C).

(B) An employee's accrued benefit under the plan as of any plan year before the employee reaches normal retirement age is determined by multiplying the employee's fractional rule benefit (within the meaning of § 1.411(b)–1(b)(3)(ii)(A)) by a fraction, the numerator of which is the employee's years of service determined as the plan year, and the denominator of which the employee's projected years of service as of normal retirement age. Thus, all employees in the plan who have the same entry age and the same number of years of service as of any plan year will have an accrued benefit that is the same percentage of average annual compensation or the same dollar amount.

(C) The normal retirement benefit under the plan is a flat benefit. For this purpose, a flat benefit is a benefit that is the same percentage of average annual compensation or the same dollar amount for all employees in the plan who have a minimum number of years of service at normal retirement age (e.g., 50 percent of average annual compensation), with a pro rata reduction in the flat benefit for employees who have less than the minimum number of years of service at normal retirement age.

(D) The plan requires a minimum of 25 years of service at normal retirement age or an employee to receive the unreduced flat benefit, determined without regard to section 415. Thus, an employee is permitted to accrue the maximum benefit permitted under section 415 over a period of less than 25 years, provided that the flat benefit under the plan, determined without regard to section 415, can accrue over no less than 25 years.

(ii) *Examples.* The following examples illustrate the flat benefit safe harbor in this paragraph (b)(5). In each example, it is assumed that the plan has never permitted employee contributions.

Example 1. Plan A provides a normal retirement benefit of 100 percent of average annual compensation, reduced by 4 percentage points for each year of service below 25 the employee has at normal retirement age. Plan A further provides that an employee's accrued benefit as of any plan year is equal to the employee's fractional rule benefit multiplied by a fraction, the numerator of which is the employee's years of service as of the plan year, and the denominator of which is the employee's projected years of service at normal retirement age. In the case of an employee who has 5 years of service as of the current plan year, and who is projected to have 10 years of service at normal retirement age, the employee's fractional rule benefit would be 40 percent of average annual compensation, and the employee's accrued benefit as of the current plan year would be 20 percent of average annual compensation (the fractional rule benefit multiplied by a fraction of 5 years over 10 years). Plan A satisfies the requirements of this paragraph (b)(5).

Example 2. The facts are the same as in *Example 1*, except that the normal retirement benefit is 125 percent of average annual compensation, reduced by 5 percentage points for each year of service below 25 that the employee has at normal retirement age. Plan A satisfies the requirements of this paragraph (b)(5), even though an employee may accrue the maximum benefit allowed under section 415 (i.e., 100 percent of the participant's average compensation for the high 3 years of service) in less than 25 years.

Example 3. The facts are the same as in *Example 1,* except that plan determines each employee's accrued benefit by multiplying the employee's projected normal retirement benefit by the fraction described in *Example 1.* In determining an employee's projected normal retirement benefit, the plan defines each employee's average annual compensation as the average annual compensation the employee would have at normal retirement age if the employee's annual section 414(s) compensation in future plan years equaled the employee's plan year compensation for the prior plan year. Under these facts, Plan A does not satisfy paragraph (b)(5)(i)(B) of this section because the projected normal retirement benefit used to determine an employee's accrued benefit is not the employee's fractional rule benefit determined in accordance with § 1.411(b)–1(b)(3)(ii)(A).

Example 4. Plan B provides a normal retirement benefit of 50 percent of average annual compensation, with a pro rata reduction for employees with less than 30 years of service at normal retirement age. Plan B further provides that an employee's accrued benefit as of any plan year is equal to the employee's fractional rule benefit multiplied by a fraction, the numerator of which is the employee's years of service as of the plan year, and the denominator of which is the employee's projected years of service at normal retirement age. For purposes of determining this fraction, the plan limits the years of service taken into account for an employee to the number of years the employee has participated in the plan. However, all years of service (including years of service before the employee commenced participation in the plan) are taken into account in determining an employee's normal retirement benefit under the plan's benefit formula. Plan B fails to satisfy the requirements of this paragraph (b)(5) because the definition of years of service for determining the normal retirement benefit differs from the definition of years of service for determining the accrued benefit. See paragraphs (b)(2)(v) and (b)(8)(xi)(D) of this section.

(6) *Alternative safe harbor for flat benefit plan.* A plan satisfies the safe harbor in this paragraph (b)(6) for a plan year if it satisfies each of the following requirements—

(i) The plan satisfies the requirements of paragraph (b)(5) of this section, other than the requirement of paragraph (b)(5)(i)(D) of this section that the minimum number of years of service for receiving the unreduced flat benefit is at least 25 years.

(ii) For the plan year, the average of the normal accrual rates for all nonhighly compensated nonexcludable employees is at least 70 percent of the average of the normal accrual rates for all highly compensated nonexcludable employees. Thus, the averages in the preceding sentence are determined taking into account all nonexcludable employees (regardless of whether they benefit under the plan). In addition, contributions and benefits under other plans of the employer are disregarded. For purposes of this paragraph (b)(6), normal accrual rates are determined under paragraph (d) of this section, without regard to the grouping rules of paragraph (d)(6)(iv) of this section. Thus, for example, accrual rates may be determined taking into account the imputed disparity rules of § 1.401(a)(4)–7.

(7) *Safe harbor for insurance contract plans.* A plan satisfies the safe harbor in this paragraph (b)(7) if it satisfies each of the following requirements—

(i) The plan satisfies the accrual rule of section 411(b)(1)(F).

(ii) The plan is an insurance contract plan within the meaning of section 412(i).

(iii) The benefit formula under the plan would satisfy the requirements of paragraph (b)(4) or (b)(5) of this section if the stated normal retirement benefit under the formula accrued ratably over each employee's period of plan participation through normal retirement age in accordance with paragraph (b)(4)(i)(B) or (b)(5)(i)(B) of this section. Thus, the benefit formula may not recognize years of service before an employee commences participation in the plan because, otherwise, the definition of years of service for determining the normal retirement benefit would differ from the definition of years of service for determining the accrued benefit under paragraph (b)(4)(i)(B) or (b)(5)(i)(B) of this section. See paragraph (b)(5)(ii), *Example 3*, of this section. Notwithstanding the foregoing, a plan adopted and in effect on September 19, 1991 may continue to recognize years of service prior to an employee's participation in the plan to the extent provided in the plan on such date. The preceding sentence does not apply in the case of an employee who first becomes a participant in the plan after that date.

(iv) The scheduled premium payments under an individual or group insurance contract used to fund an employee's normal retirement benefit are level annual payments to normal retirement age. Thus, payments may not be scheduled to cease before normal retirement age.

(v) The premium payments for an employee who continues participation after normal retirement age are equal to the amount necessary to fund additional benefits that accrue under the plan's benefit formula for the plan year.

(vi) Experience gains, dividends, forfeitures, and similar items are used solely to reduce future premiums.

(vii) All benefits are funded through contracts of the same series. Among other requirements, contracts of the same series must have cash values based on the same terms (including interest and mortality assumptions), and the same conversion rights. A plan does not fail to satisfy this requirement, however, if any change in the contract series or insurer applies on the same terms to all employees in the plan. But see § 1.401(a)(4)–5(a)(6), *Example 12* (change in insurer considered a plan amendment subject to § 1.401(a)(4)–5(a)).

(viii) If permitted disparity is taken into account, the normal retirement benefit stated under the plan's benefit formula satisfies the requirements of § 1.401(*l*)–3. For this purpose, the 0.75-percent factor in the maximum excess or offset allowance in § 1.401(*l*)–3(b)(2)(i) or (b)(3)(i), respectively, adjusted in accordance with § 1.401(*l*)–3(d)(9) and (e), is reduced by multiplying the factor by 0.80.

(8) *Use of safe harbors not precluded by certain plain provisions*—(i) *In general.* A plan does not fail to satisfy the requirements of this paragraph (b) merely because the plan contains one or more of the provisions described in this paragraph (b)(8). Unless otherwise provided, the provision must apply uniformly to all employees in the plan. Paragraph (f) of this section provides additional rules on plan provisions that may be relevant in determining whether a plan satisfies this paragraph (b).

(ii) *Section 401(l) permitted disparity.* The plan takes permitted disparity into account in a manner that satisfies section 401(l) in form. Thus, differences in employees' benefits under the plan attributable to uniform disparities permitted under § 1.401(l)–3 (including differences in disparities that are deemed uniform under § 1.401(l)–3(c)(2)) do not cause a plan to fail to satisfy the requirements of this paragraph (b).

(iii) *Entry dates.* The plan provides one or more entry dates during the plan year as permitted by section 410(a)(4).

(iv) *Prior vesting schedules.* The plan provides different vesting schedules solely to the extent necessary to comply with section 411(a)(10) (relating to changes in vesting schedules).

(v) *Certain conditions on accruals.* The plan provides that an employee's accrual for the plan year is less than a full accrual (including a zero accrual) because of a plan provision permitted by the year-of-participation rules of section 411(b)(4).

(vi) *Certain limits on accruals.* The plan limits benefits otherwise provided under the benefit formula or accrual

method to a maximum dollar amount or to a maximum percentage of average annual compensation or in accordance with section 401(a)(5)(D), or limits the dollar amount of annual section 414(s) compensation or average annual compensation taken into account in determining benefits. The plan may apply these limits solely to all highly compensated employees in the plan. If the plan does so, rules similar to those provided in paragraph (b)(8)(xiii)(D)(*2*) of this section must be applied in the case of a nonhighly compensated employee who becomes a highly compensated employee and thus subject to a limit.

(vii) *Dollar accrual per uniform unit of service.* The plan determines accruals based on the same dollar amount for each uniform unit of service (not to exceed 1 week) performed by each employee with the same number of years of service under the plan during the plan year. The preceding sentence applies solely for purposes of the unit credit safe harbor in paragraph (b)(3) of this section.

(viii) *Prior benefits accrued under a different formula*—(A) *All employees in plan.* The plan provides benefits that were accrued in plan years beginning before a fresh-start date under a benefit formula or accrual method that differs from the benefit formula and accrual method used to determine benefit accruals in plan years beginning after the fresh-start date. This paragraph (b)(8)(viii) applies solely to plans that meet the requirements of § 1.401(a)(4)–13(c) with regard to benefits accrued after the fresh-start date.

(B) *Section 401(a)(17) employees only.* The plan provides benefits that were accrued before the effective date applicable to the plan under § 1.401(a)(17)–1(d)(1) and determines the accrued benefits of section 401(a)(17) employees under a fresh-start formula that applies solely to such employees, as permitted under § 1.401(a)(17)–1(e)(3)(ii).

(ix) *Employee contributions*—(A) *Unit credit safe harbor.* The plan is a contributory DB plan that otherwise satisfies the requirements of the unit credit safe harbor in paragraph (b)(3) of this section. This paragraph (b)(8)(ix)(A) applies only if the plan satisfies one of the methods in § 1.401(a)(4)–6(b)(2) through (b)(6) (the composition-of-workforce method, the minimum benefit method, the grandfather rule for plans in existence on May 14, 1990, the government plan method, and the cessation-of-employee-contributions method, respectively). Thus, for example, if a plan complies with the minimum benefit method under § 1.401(a)(4)–6(b)(3), the plan does not fail to satisfy the safe harbor in paragraph (b)(3) of this section merely because the plan includes employee contributions that are not allocated to separate accounts, or merely because the benefits under the plan are nonuniform solely as a result of the minimum benefit added to the plan to satisfy § 1.401(a)(4)–6(b)(3).

(B) *Other safe harbors.* The plan is a contributory DB plan that otherwise satisfies the requirements of one of the safe harbors in paragraphs (b)(4) through (b)(7) of this section. This paragraph (b)(8)(ix)(B) applies only if the plan satisfies one of the methods in § 1.401(a)(4)–6(b)(4) through (b)(6) (the grandfather rule for plans in existence on May 14, 1990, the government plan method, and the cessation-of-employee-contributions method, respectively).

(x) *Modifications to average annual compensation*—(A) *Certain years disregarded.* In determining average annual compensation, the plan completely disregards either or both of the following types of 12-month periods in an employee's compensation history—

(*1*) The 12-month period in which the employee terminates employment, or

(*2*) All 12-month periods in which the employee has less than 1,000 hours of service or, in the case of a plan that credits service using the elapsed time method, all 12-month periods in which the employee performs services during less than six months.

(B) *Use of plan year compensation by accumulation plan.* In the case of an accumulation plan, the plan substitutes plan year compensation for average annual compensation, as required under the definition of accumulation plan in § 1.401(a)(4)–12.

(xi) *Multiple definitions of service*—(A) *In general.* The plan provides different definitions of years of service for different purposes under the plan, provided that for each purpose, the same definition of years of service applies to all employees in the plan. Thus, for example, the plan may define years of service for purposes of vesting as all years of service in which the employee has completed at least 1,000 hours of service, and for purposes of benefit accrual as all years of participation in which the employee has completed at least 2,000 hours of service (with a pro rata reduction for employees with less than 2,000 hours of service).

(B) *Hour-of-service equivalencies.* The plan credits service for a specific purpose for some employees (e.g., hourly employees) based on hours of service as provided for in 29 CFR 2530.200b–2, but credits service for the same purpose for other employees (e.g., salaried employees) based on one of the equivalencies set forth in 29 CFR 2530.200b–3.

(C) *Recognition of prior employment for eligibility and vesting.* The plan credits service for purposes of eligibility or vesting (or both) for service with a prior employer. This rule applies solely to employees who become employees of the employer pursuant to a transaction between the employer and the prior employer that is a stock or asset acquisition, a merger, or other similar transaction involving a change in the employer of the employees of a trade or business.

(D) *Special rule for benefit formula and accrual method.* Notwithstanding paragraph (b)(8)(xi)(A) of this section, the plan must use the same definition of years of service for purposes of applying the benefit formula and accrual method under the plan, including the years over which the benefit accrues. Thus, for example, for purposes of the safe harbors in paragraphs (b)(4), (b)(5), and (b)(6) of this section, the plan must use the same definition of years of service to determine both the normal retirement benefit under the plan's benefit formula and the fraction by which an employee's fractional rule benefit is multiplied to derive the employee's accrued benefit as of any plan year. A plan does not fail to satisfy the requirement in this paragraph (b)(8)(xi)(D) merely because the benefit formula limits the years of service used to determine the normal retirement benefit to a fixed number of years of service (e.g., 25).

(E) *Imputed service.* The plan credits imputed service as permitted under § 1.401(a)(4)–11(d)(2).

(xii) *Offsets for benefits accrued under another defined benefit plan*—(A) *In general.* The plan provides that an employee's benefits otherwise determined under the plan are reduced by reference to the employee's benefits under another defined benefit plan maintained by the same or another employer (the "prior plan"). For this purpose, benefits under a defined benefit plan include benefits provided under annuities distributed upon the termination of a defined benefit plan. This paragraph (b)(8)(xii)(A) applies only if the requirements of paragraphs (b)(8)(xii)(B) through (F) of this section are satisfied.

(B) *Benefits frozen under prior plan.* The employee must cease to accrue benefits under the prior plan before commencing participation in the plan, and the employee's benefits under the prior plan must be frozen as of the date employee ceases accruing benefits in the prior plan. Thus, for example, the

employee's benefits under the prior plan may not be increased due to subsequent increases in the employee's compensation. Notwithstanding the foregoing, adjustments in the employee's frozen accrued benefit that would be permitted under § 1.401(a)(4)–13(c)(5)(i), (c)(5)(ii), (c)(5)(iv), (c)(6)(i), and (c)(6)(ii) (regarding increases permitted under section 415(d), increases for former employees, increases in top-heavy minimum benefits, subsequent eligibility and vesting service, and new optional forms of benefit, respectively) may be made under the prior plan.

(C) *Wrap-around benefit provided in plan.* The plan must provide that the employee's vested accrued benefit under the plan is equal to the employee's vested accrued benefit otherwise determined under the plan's benefit formula and accrual method, as applied to the employee's total number of years of service under the plan and the prior plan (determined without double-counting any year of service), minus the offset. For this purpose, the offset must equal the actuarial equivalent of the vested portion of the employee's frozen accrued benefit under the prior plan (adjusted, if applicable, in accordance with § 1.401(a)(4)–13(c)(5)(i), (ii) and (iv), but not § 1.401(a)(4)–13(c)(5)(iii)).

(D) *Uniform application of offset.* The offset provision in the plan must apply uniformly to all employees in the plan who have, or have had, accrued benefits under the prior plan. For this purpose, the prior plan includes any other plan that is or has been aggregated with the prior plan for purposes of sections 401(a)(4) and 410(b). If the prior plan is or has been aggregated with a defined contribution plan, the requirement of this paragraph (b)(8)(xii)(D) cannot be satisfied, because the offset provision cannot be applied uniformly to all employees in the plan who have, or have had, accrued benefits under the prior plan.

(E) *Offset employees not needed to satisfy minimum coverage.* The plan would satisfy section 410(b) if § 1.410(b)–3(a)(2)(iv) (regarding benefit offset arrangements) did not apply. Thus, the plan must still satisfy section 410(b) if each employee whose benefits are offset is not treated as benefiting under the plan until such time as the employee's accrued benefit under the plan (determined without regard to the offset) is greater than the offset. Notwithstanding the foregoing, § 1.410(b)–(3)(a)(2)(iv) is still applied for this purpose to an employee whose benefits under the prior plan were provided pursuant to a collective bargaining agreement and were accrued in plan years in which the employee was an excludable employee under § 1.410(b)–6(d) (regarding employees covered by a collective bargaining agreement).

(F) *Prior plan maintained by another employer.* If the prior plan is maintained by another employer, the employees whose benefits are subject to the offset must have become employees of the employer maintaining the plan pursuant to a transaction between the employer and the other employer that is a stock or asset acquisition, a merger, or other similar transaction involving a change in the employer of the employees of a trade or business.

(xiii) *Multiple formulas*—(A) *In general.* The plan provides that an employee's benefit under the plan is the greater of the benefits determined under two or more formulas. Alternatively, the plan provides that an employee's benefit under the plan is the sum of the benefits determined under two or more formulas. This paragraph (b)(8)(xiii) does not apply to a plan unless each of the formulas under the plan satisfies the requirements of paragraphs (b)(8)(xiii)(B) through (D) of this section. See § 1.401(l)–5(b)(8)(ii) for rules regarding the overall permitted disparity limitations.

(B) *Sole formulas.* The formulas are the only formulas under the plan.

(C) *Separate testing.* Each of the formulas separately satisfies the uniformity requirements of paragraph (b)(2) of this section and also separately satisfies one of the safe harbors in paragraphs (b)(3) through (b)(7) of this section. For this purpose, the formulas need not satisfy the same safe harbor. In addition, a formula that is available solely to all nonhighly compensated employees in the plan is deemed to satisfy this paragraph (b)(8)(xiii)(C).

(D) *Availability*—(*1*) *General rule.* All of the formulas are available on the same terms to all employees in the plan.

(*2*) *Formulas for nonhighly compensated employees.* A formula does not fail to be available on the same terms to all employees in the plan merely because the formula is available solely to all nonhighly compensated employees in the plan on the same terms as all the other formulas in the plan. If an employee was previously subject to a formula that was available solely to all nonhighly compensated employees in the plan and the employee subsequently becomes a highly compensated employee, the employee's accrued benefit under the plan in plan years beginning after the last plan year in which the employee was a nonhighly compensated employee must be determined in accordance with one of the formulas in § 1.401(a)(4)–13 (c)(2) through (c)(4). For purposes of applying the formulas in § 1.401(a)(4)–13 (c)(2) through (c)(4), the fresh-start date is the last day of the last plan year in which the employee was a nonhighly compensated employee, and the formula applicable to benefit accruals in the current plan year in the formula (or formulas) under the plan applicable to the highly compensated employee in plan years beginning after the fresh-start date.

(*3*) *Top-heavy formulas.* In the case of a plan that provides the greater of the benefits under two or more formulas, one of which is a top-heavy formula, the top-heavy formula does not fail to be available on the same terms to all employees in the plan merely because the formula is available solely to all non-key employees in the plan on the same terms as all the other formulas under the plan. Furthermore, the top-heavy formula does not fail to be available on the same terms as the other formulas under the plan merely because the top-heavy formula is conditioned on the plan's being top-heavy within the meaning of section 416(g). For purposes of this paragraph (b)(8)(xiii)(D)(*3*), a top-heavy formula is a formula that provides a benefit equal to the minimum benefit described in section 416(c)(1) (taking into account, if applicable, the modification in section 416(h)(2)(A)(ii)(I)).

(E) *Provisions may be applied more than once.* The provisions of this paragraph (b)(8)(xiii) may be applied more than once. For example, a plan satisfies the requirements of paragraph (b) of this section if an employee's benefit under the plan is the greater of the benefits under two or more formulas and one or more of those formulas is the sum of the benefits under two or more other formulas, provided that each of the formulas under the plan satisfies the requirements of paragraph (b)(8)(xiii) (B) through (D) of this section.

(F) *Examples.* The following examples illustrate the rules regarding multiple formulas in this paragraph (b)(8)(xiii).

Example 1. Under Plan A, each employee's benefit equals the sum of the benefits determined under two formulas. The first formula provides 1 percent of average annual compensation per year of service. The second formula provides $10 per year of service. Plan A is eligible to apply the rules in this paragraph (b)(8)(xiii).

Example 2. Under Plan B, each employee's benefit equals the greater of the benefits determined under two formulas. The first formula provides $15 per year of service and is available to all employees who complete at least 500 hours of service during the plan

year. The second formula provides 1.5 percent of average annual compensation per year of service and is available to all employees who complete at least 1,000 hours of service during the plan year. Plan B does not satisfy this paragraph (b)(8)(xiii) because the two formulas are not available on the same terms to all employees in the plan.

Example 3. Under Plan C, each employee's benefit equals the greater of the benefits determined under two formulas. The first formula provides $15 per year of service and is available to all employees who complete at least 1,000 hours of service during the plan year. The second formula provides the minimum benefit described in section 416(c)(1) and is available to all non-key employees who complete at least 1,000 hours of service during the plan year. Plan C does not satisfy the general rule in paragraph (b)(8)(xiii)(D)(*1*) of this section because the two formulas are not available on the same terms to all employees in the plan (i.e., the second formula is only available to all non-key employees in the plan). Nonetheless, because the second formula is a top-heavy formula, the special availability rules for top-heavy formulas in paragraph (b)(8)(xiii)(D)(*3*) of this section apply. Thus, the second formula does not fail to be available on the same terms as the first formula merely because the second formula is available solely to all non-key employees in the plan on the same terms. This is true even if the plan conditions the availability of the second formula on the plan's being top-heavy for the plan year.

Example 4. Under Plan D, each employee's benefit equals the greater of the benefits determined under two formulas. The first formula is available to all employees in the plan and provides a benefit equal to 2 percent of average annual compensation per year of service, minus the maximum offset allowance permitted under section 401(l). The second formula is only available to nonhighly compensated employees in the plan and provides a benefit equal to 2 percent of average annual compensation per year of service, minus 2 percent of the primary insurance amount per year of service. Under paragraph (b)(8)(xiii)(D)(*2*) of this section, both formulas are treated as available to all employees in the plan on the same terms. Furthermore, even though the second formula does not satisfy any of the safe harbors in this paragraph (b), the formula is deemed to satisfy the separate testing requirement under paragraph (b)(8)(xiii)(C) of this section, because the formula is available solely to all nonhighly compensated employees in the plan.

Example 5. Plan E provides a benefit of 1 percent of average annual compensation per year of service to all employees in the plan. In 1994, the plan is amended to provide a benefit of 2 percent of average annual compensation per year of service after 1993, while retaining the 1-percent formula for all years of service before 1994. This new formula provides a benefit equal to the sum of the benefits determined under two formulas: 1 percent of average annual compensation per year of service, plus 1 percent of average annual compensation per year of service after 1993. Plan E is eligible to apply the rules in this paragraph (b)(8)(xiii).

Example 6. The facts are the same as in *Example 5*, except that the plan amendment in 1994 decreases the benefit to 0.5 percent of average annual compensation per year of service after 1993, while retaining the 1-percent formula for all years of service before 1994. This new formula provides a benefit equal to the sum of the benefits determined under two formulas: 0.5 percent of average annual compensation per year of service, plus 0.5 percent of average annual compensation per year of service before 1994. Under these facts, the second formula does not separately satisfy any of the safe harbors in this paragraph (b) because the definition of years of service for purposes of applying the benefit formula (years of service before 1994) differs from the definition of years of service over which the resulting benefit accrues (all years of service). See paragraphs (b)(2)(v) and (b)(8)(xi)(B) of this section.

Example 7. Plan F provides a benefit to all employees of 1 percent of average annual compensation per year of service. Employee P was hired as the president of the employer in December 1994 and was not a highly compensated employee under section 414(q) during the 1994 calendar plan year. In 1994, Plan F is amended to provide a benefit that is the greater of the benefit determined under the pre-existing formula in the plan and a new formula that is available solely to all nonhighly compensated employees in the plan. The new formula does not satisfy any of the safe harbors in this paragraph (b), because the formula provides a greater benefit for Employee P than for other nonhighly compensated employees in the plan. In 1995, when Employee P first becomes a highly compensated employee, the second formula no longer applies to Employee P. It would be inconsistent with the purpose of preventing discrimination in favor of highly compensated employees for Plan F to use the special rule for a formula that is available solely to all nonhighly compensated employees to satisfy the separate testing requirement of paragraph (b)(8)(xiii)(C) of this section for the 1994 calendar plan year. See § 1.401(a)(4)–1(c)(2).

(c) *General test for nondiscrimination in amount of benefits*—(1) *Basic test.* A plan satisfies the requirements of this section for a plan year if each rate group under the plan satisfies section 410(b). For purposes of this paragraph (c)(1), a rate group exists under a plan for each highly compensated employee in the plan and consists of the highly compensated employee and all other employees (both highly and nonhighly compensated) in the plan who have a normal accrual rate greater than or equal to the highly compensated employee's normal accrual rate, and who also have a most valuable accrual rate greater than or equal to the highly compensated employee's most valuable accrual rate. Thus, an employee is in the rate group for each highly compensated employee in the plan who has a normal accrual rate less than or equal to the employee's normal accrual rate, and who also has a most valuable accrual rate less than or equal to the employee's most valuable accrual rate.

(2) *Alternative test*—(i) *In general.* In the case of a plan that determines the QJSA at each age as a uniform percentage of each employee's normal retirement benefit, the plan satisfies the requirements of this section if each rate group under the plan satisfies section 410(b). For purposes of this paragraph (c)(2), a rate group exists under a plan for each highly compensated employee in the plan and consists of the highly compensated employee and all other employees (both highly and nonhighly compensated) in the plan who have a most valuable accrual rate greater than or equal to the highly compensated employee's most valuable accrual rate. Thus, an employee is in the rate group for each highly compensated employee in the plan who has a more valuable accrual rate less than or equal to the employee's most valuable accrual rate.

(ii) *Plan requirements.* A plan determines the QJSA at each age as a uniform percentage of each employee's normal retirement benefit only if the plan satisfies each of the following requirements—

(A) The plan does not provide a QSUPP;

(B) The plan does not adjust most valuable accrual rates to reflect the value of certain disability benefits under paragraph (d)(6)(vi) of this section;

(C) The same uniform normal retirement age applies to all employees in the plan; and

(D) The QJSA at each age under the plan is determined by multiplying an employee's accrued benefit by a factor for that age that is the same for all employees in the plan.

(iii) *Certain QJSA adjustments permitted*—(A) *In general.* A plan does not fail to meet the requirement in paragraph (c)(2)(ii)(D) of this section merely because the plan makes one or more of the adjustments described in this paragraph (c)(2)(iii) in the factor used to determine the QJSA at each age under the plan. In each case, the adjustment must apply on the same terms to all employees in the plan.

(B) *Adjustment for marital status or age of spouse.* The plan adjusts the factor for determining the QJSA at each age under the plan to take into account the marital status of the employee or the age of the employee's spouse.

(C) *Adjustment for termination of employment before earliest retirement age.* The factor used to determine the QJSA at each age before normal retirement age under the plan is lower for employees who terminate

employment before the earliest retirement age for which they are eligible to commence benefits under the plan than for employees who terminate employment at or after the earliest retirement age for which they are eligible to commence benefits under the plan.

(iv) *Minimum service condition on early retirement benefits.* A plan also does not fail to meet the requirement in paragraph (c)(2)(ii)(D) of this section merely because the plan provides that early retirement benefits (and thus the QJSA at any age before normal retirement age) are available only to employees who terminate employment after completing a minimum number of years of service.

(3) *Satisfaction of section 410(b) by a rate group*—(i) *In general.* For purposes of determining whether a rate group satisfies section 410(b), the rate group is treated as if it were a separate plan that benefits only the employees included in the rate group. Except as provided in paragraphs (c)(3)(ii) through (v) of this section, the rules that apply in determining whether a rate group satisfies section 410(b) are the same as apply in determining whether a plan satisfies section 410(b). Thus, for example, if the rate group does not satisfy the ratio percentage test of § 1.410(b)–2(b)(2), the rate group must satisfy the average benefit test of § 1.410(b)–2(b)(3) (including the nondiscriminatory classification test of § 1.410(b)–4 and the average benefit percentage test of § 1.410(b)–5).

(ii) *Permissive aggregation not available.* The permissive aggregation rules of § 1.410(b)–7(d) are not available to a rate group in determining whether it satisfies section 410(b).

(iii) *Deemed satisfaction of reasonable classification requirement.* In determining whether a rate group satisfies the nondiscriminatory classification test of § 1.410(b)–4, the rate group is deemed to satisfy the reasonable classification requirement of § 1.410(b)–4(b).

(iv) *Facts-and-circumstances requirements replaced.* In determining whether a rate group satisfies the nondiscriminatory classification test of § 1.410(b)–4, the facts-and-circumstances requirements of § 1.410(b)–4(c)(3) do not apply. Instead, the rate group is deemed to satisfy the facts-and-circumstances requirements of § 1.410(b)–4(c)(3), but only if the ratio percentage of the rate group is greater than or equal to the lesser of—

(A) The ratio percentage of the plan, or

(B) The midpoint between the safe and the unsafe harbor percentages applicable to the plan.

(v) *Application of average benefit percentage test.* A rate group satisfies the average benefit percentage test of § 1.410(b)–5 if the plan of which it is a part satisfies § 1.410(b)–5 (applied without regard to § 1.410(b)–5(f)). In the case of a plan that relies on § 1.410(b)–5(f) to satisfy the average benefit percentage test, each rate group under the plan satisfies the average benefit percentage test (if applicable) only if the rate group separately satisfies § 1.410(b)–5(f)).

(4) *Examples*—(i) *In general.* Paragraphs (c)(4) (ii) and (iii) of this section provide examples that illustrate this paragraph (c).

(ii) *Example illustrating basic test.* The following example illustrates the basic test in paragraph (c)(1) of this section.

Example. (a) Employer X has 110 nonexcludable employees, N1 through N100, who are nonhighly compensated employees, and H1 through H10, who are highly compensated employees. Employer X maintains Plan Y, a defined benefit plan that benefits all of these nonexcludable employees. Assume that Plan Y is not eligible to use the alternative test in paragraph (c)(2) of this section. The normal and most valuable accrual rates (determined as a percentage of testing compensation) for the employees in Plan Y for the 1994 plan year are listed in the following table.

Employee	Normal accrual rate	Most valuable accrual rate
N1 through N10	1.0	1.4
N11 through N50	1.5	3.0
N51 through N75	2.0	2.65
N76 through N100	2.3	2.8
H1 through H5	1.5	2.0
H6 through H10	2.0	2.65

(b) There are 10 rate groups in Plan Y because there are 10 highly compensated employees in Plan Y.

(c) Rate group 1 consists of H1 and all those employees who have a normal accrual rate greater than or equal to H1's normal accrual rate (1.5 percent) and who also have a most valuable accrual rate greater than or equal to H1's most valuable accrual rate (2.0 percent). Thus, rate group 1 consists of H1 through H10 and N11 through N100.

(d) Rate group 1 satisfies the ratio percentage test of § 1.410(b)–2(b)(2) because the ratio percentage of the rate group is 90 percent, i.e., 90 percent (the percentage of all nonhighly compensated nonexcludable employees who are in the rate group) divided by 100 percent (the percentage of all highly compensated nonexcludable employees who are in the rate group).

(e) Because H1 through H5 have the same normal accrual rates and the same most valuable accrual rates, the rate group with respect to each of them is identical. Thus, because rate group 1 satisfies section 410(b), rate groups 2 through 5 also satisfy section 410(b).

(f) Rate group 6 consists of H6 and all those employees who have a normal accrual rate greater than or equal to H6's normal accrual rate (2.0 percent) and who also have a most valuable accrual rate greater than or equal to H6's most valuable accrual rate (2.65 percent). Thus, rate group 6 consists of H6 through H10 and N51 through N100. (Even though N11 through N50 have a most valuable accrual rate (3.0 percent) greater than H6's most valuable accrual rate (2.65 percent), they are not included in this rate group because their normal accrual rate (1.5 percent) is less than H6's normal accrual rate (2.0 percent).)

(g) Rate group 6 satisfies the ratio percentage test of § 1.410(b)–2(b)(2) because the ratio percentage of the rate group is 100 percent, i.e., 50 percent (the percentage of all nonhighly compensated nonexcludable employees who are in the rate group) divided by 50 percent (the percentage of all highly compensated nonexcludable employees who are in the rate group).

(h) Because H6 through H10 have the same normal accrual rates and the same most valuable accrual rates, the rate group with respect to each of them is identical. Thus, because rate group 6 satisfies section 410(b), rate groups 7 through 10 also satisfy section 410(b).

(i) Plan Y satisfies the requirements of paragraph (c)(1) of this section because each rate group under the plan satisfies section 410(b).

(iii) *Examples illustrating alternative test.* The following examples illustrate the alternative test in paragraph (c)(2) of this section. In each example, unless otherwise provided, it is assumed that the plan satisfies paragraphs (c)(2)(ii) (A) through (C) of this section.

Example 1. Plan A provides salaried employees with a benefit equal to 1 percent of average compensation times each year of service less 1 percent of the projected primary insurance amount times each year of service. Plan A provides hourly employees with a monthly annuity of $25 times each year of service. Normal retirement age under the plan is age 65. Plan A also provides that employees who retire after age 55 but before normal retirement age and who have at least 10 years of service will receive an immediate QJSA that is reduced by 4 percent per year for each year prior to normal retirement age. In addition, employees who terminate with 10 years of service but before age 55 will receive a QJSA that is the actuarial equivalent under the terms of the plan of the normal retirement benefit.

Under paragraphs (c)(2)(iii)(C) and (c)(2)(iv) of this section, Plan A does not fail to determine the QJSA at each age under the plan as a uniform percentage of each employee's normal retirement benefit merely because of these early retirement provisions.

Example 2. The facts are the same as in *Example 1,* except that the plan also provides

that an employee may retire at any age after completing 30 years of service and receive an unreduced benefit. For purposes of paragraph (c)(2) of this section, Plan B does not determine the QJSA at each age under the plan as a uniform percentage of each employee's normal retirement benefit because the plan's factors for determining the QJSA at each age for employees who terminate employment after attaining the earliest retirement age under the plan vary depending on the employee's service.

Example 3. Plan B provides a benefit equal to 1 percent of average compensation times each year of service, less 1 percent of the projected primary insurance amount times each year of service. In determining an employee's early retirement benefit, one early retirement factor is applied to the gross benefit under the formula, and a different early retirement factor is applied to the offset under the formula. For purposes of paragraph (c)(2) of this section, Plan C does not determine the QJSA at each age under the plan as a uniform percentage of each employee's normal retirement benefit because the plan's factors for determining the QJSA at each age vary among employees depending on the relative sizes of their gross benefit and the offset applied to it.

Example 4. (a) Employer X has only 6 nonexcludable employees, all of whom benefit under Plan C. The nonhighly compensated employees in the plan are N1 through N4, and the highly compensated employees in the plan are H1 and H2. Assume that Plan C is eligible to use the alternative test of paragraph (c)(2) of this section. For the 1994 plan year, N1 through N4 and H1 have a most valuable accrual rate of 1.75 percent of testing compensation. For the same plan year, H2 has a most valuable accrual rate of 2.5 percent of testing compensation.

(b) There are two rate groups under Plan C. Rate group 1 consists of H1 and all those employees in the plan who have a most valuable accrual rate greater than or equal to H1's most valuable accrual rate (1.75 percent). Thus, rate group 1 consists of H1, H2, and N1 through N4. Rate group 2 consists only of H2 because no other employee in the plan has a most valuable accrual rate greater than or equal to H2's most valuable accrual rate.

(c) Rate group 2 does not satisfy the ratio percentage test of § 1.410(b)–2(b)(2) because the ratio percentage of the rate group is 0 percent, i.e., 0 percent (the percentage of all nonhighly compensated nonexcludable employees who are in the rate group) divided by 50 percent (the percentage of all highly compensated nonexcludable employees who are in the rate group).

(d) Rate group 2 also does not satisfy the nondiscriminatory classification test of § 1.410(b)–4 because the ratio percentage of the rate group (0 percent) is less than the unsafe harbor percentage applicable to the plan under § 1.410(b)–4(c)(4) (35.5 percent).

(e) Rate group 2 therefore does not satisfy section 410(b) and, as a result, Plan C does not satisfy the requirements of paragraph (c)(2) of this section. This is true even though rate group 1 satisfies the ratio percentage test of § 1.410(b)–2(b)(2).

Example 5. (a) The facts are the same as in *Example 4*, except that N4 has a most valuable accrual rate of 2.5 percent.

(b) There are 2 rate groups in Plan C. Rate group 1 consists of H1 and all those employees who have a most valuable accrual rate greater than or equal to H1's most valuable accrual rate (1.75 percent). Thus, rate group 1 consists of H1, H2, and N1 through N4. Rate group 2 consists of H2 and all those employees who have a most valuable accrual rate greater than or equal to H2's most valuable accrual rate (2.5 percent). Thus, rate group 2 consists of H2 and N4.

(c) Rate group 1 satisfies the ratio percentage test of § 1.410(b)–2(b)(2) because the ratio percentage of the rate group is 100 percent, i.e., 100 percent (the percentage of all nonhighly compensated nonexcludable employees who are in the rate group) divided by 100 percent (the percentage of all highly compensated nonexcludable employees who are in the rate group).

(d) Rate group 2 does not satisfy the ratio percentage test of § 1.410(b)–2(b)(2) because the ratio percentage of the rate group is 50 percent, i.e., 25 percent (the percentage of all nonhighly compensated nonexcludable employees who are in the rate group) divided by 50 percent (the percentage of all highly compensated nonexcludable employees who are in the rate group).

(e) However, rate group 2 does satisfy the nondiscriminatory classification test of § 1.410(b)–4 because the rate group is deemed to satisfy the reasonable classification requirement of § 1.410(b)–4(b) and the ratio percentage of the rate group (50 percent) is greater than the safe harbor percentage applicable to the plan under § 1.410(b)–4(c)(4) (45.5 percent).

(f) If rate group 2 satisfies the average benefit percentage test of § 1.410(b)–5, then rate group 2 satisfies section 410(b). In that case, Plan C satisfies the requirements of paragraph (c)(2) of this section because each rate group under the plan satisfies section 410(b). See paragraph (c)(3)(v) of this section for rules governing the application of the average benefit percentage test to a rate group.

Example 6. Plan D provides a normal retirement benefit of 2 percent of average annual compensation per year of service to all highly compensated employees in the plan, and a normal retirement benefit of 1.5 percent of average annual compensation per year of service to all nonhighly compensated employees in the plan. Plan D also provides for an unreduced early retirement benefit to all employees who retire after 25 years of service. None of the highly compensated employees in the plan are projected to be eligible for the unreduced early retirement benefit before age 62. A substantial portion of the nonhighly compensated employees in the plan are projected to be eligible for the unreduced early retirement benefit before age 60. Under these facts, it would be inconsistent with the purpose of preventing discrimination in favor of highly compensated employees to apply the alternative in paragraph (c)(2) of this section to Plan D. See § 1.401(a)(4)–1(c)(2).

(d) *Determination of accrual rates*—(1) *Introduction*—(i) *Overview of rules.* This paragraph (d) provides the rules for determining the normal and most valuable accrual rates for the employees in a plan for a plan year. Paragraphs (d)(2) through (d)(4) of this section set forth the three basic methods for determining accrual rates—the annual method, the accrued-to-date method, and the projected method, respectively. Paragraph (d)(5) of this section sets forth rules of general application that must be followed in determining accrual rates under any method in this paragraph (d). Paragraph (d)(6) of this section provides certain optional rules that may be applied in determining accrual rates under this paragraph (d). Additional rules that may affect the determination of accrual rates under this paragraph (d) are set forth in paragraph (f) of this section.

(ii) *General description of accrual rates*—(A) *Normal accrual rate.* The normal accrual rate for an employee for a plan year generally can be described as the yearly rate at which the employee's normal retirement benefit under the plan accrues. This rate is determined for the plan year under one of the methods in this paragraph (d) after normalizing the employee's normal retirement benefit to the employee's testing age.

(B) *Most valuable accrual rate.* The most valuable accrual rate for an employee for a plan year generally can be described as the yearly rate at which the employee's most valuable optional form of benefit under the plan accrues. This rate is determined for the plan year under one of the methods in this paragraph (d) after normalizing the QJSA at each age under the plan to the employee's testing age and then comparing the normalized QJSA for each of these ages to determine which is the most valuable. The most valuable accrual rate is determined by reference to the QJSA because the QJSA must be at least as valuable as any other optional form of benefit commencing at (or deferred from) each age under the plan. See § 1.401(a)–20, Q&A–16. If the plan provides a QSUPP, the most valuable accrual rate also takes into account the QSUPP payable in conjunction with the QJSA at each age under the plan, because the value of the QSUPP is not reflected in the QJSA itself, and because the QSUPP payable in conjunction with the QJSA must be at least as valuable as any other QSUPP commencing at that age. See paragraph (5) of the definition of QSUPP in § 1.401(a)(4)–12. Thus, the most valuable accrual rate is designed to reflect the value of all benefits accrued or treated as accrued under section 411(d)(6) that

are payable in any form and at any time under the plan, including early retirement benefits, retirement-type subsidies, early retirement window benefits, and QSUPPs.

(iii) *General description of annual, accrued-to-date, and projected methods.* Under the annual method, the yearly rate at which benefits accrue is determined by reference to the amount of benefits the employee has accrued during the current plan year. Under the accrued-to-date method, this determination generally is made by reference to the average amount of benefits the employee has accrued each year over all years of service under the plan, up to and including the current plan year. Under the projected method, this determination generally is made by reference to the average amount of benefits the employee will have accrued each year over the employee's entire projected years of service under the plan, up to and including the plan year in which payment of each QJSA under the plan could commence to the employee. Paragraphs (d)(6) (vii) and (viii) of this section provide optional rules under which the accrued-to-date and projected methods may be applied solely with respect to benefits accrued and years of service in plan year beginning after a fresh-start date selected by the employer.

(2) *Annual method*—(i) *Normal accrual rate.* Under the annual method, the normal accrual rate for an employee in the plan for a plan year is the percentage amount determined under the following steps—

(A) Determine the employee's accrued benefit as if the employee's benefits under the plan had been frozen as of the last day of the plan year.

(B) Determine the employee's accrued benefit as if the employee's benefits under the plan had been frozen as of the last day of the prior plan year.

(C) Normalize the accrued benefit determined in paragraph (d)(2)(i)(A) of this section.

(D) Normalize the accrued benefit determined in paragraph (d)(2)(i)(B) of this section.

(E) Subtract the normalized accrued benefit determined in paragraph (d)(2)(i)(D) of this section from the normalized accrued benefit determined in paragraph (d)(2)(i)(C) of this section.

(F) Divide the difference determined in paragraph (d)(2)(i)(E) of this section by the employee's testing compensation. This rate is the employee's normal accrual rate under the plan for the plan year.

(ii) *Most valuable accrual rate.* Under the annual method, the most valuable accrual rate for an employee in the plan for a plan year is the percentage amount determined under the following steps—

(A) Determine the QJSA, and the QSUPP (if any) payable in conjunction with the QJSA, at each age payment of these benefits to the employee could commence under the plan. For this purpose, each QJSA and each QSUPP is determined as if the employee's benefits under the plan had been frozen as of the last day of the plan year.

(B) Determine the QJSA, and the QSUPP (if any) payable in conjunction with the QJSA, at each age payment of these benefits to the employee could commence under the plan. For this purpose, each QJSA and each QSUPP is determined as if the employee's benefits under the plan had been frozen as of the last day of the prior plan year.

(C) Normalize each QJSA and each QSUPP determined in paragraph (d)(2)(ii)(A) of this section.

(D) Normalize each QJSA and each QSUPP determined in paragraph (d)(2)(ii)(B) of this section.

(E) Subtract the normalized QJSA determined for each age in paragraph (d)(2)(ii)(D) of this section from the normalized QJSA determined for the same age in paragraph (d)(2)(ii)(C) of this section.

(F) Subtract the normalized QSUPP determined for each age in paragraph (d)(2)(ii)(D) of this section from the normalized QSUPP determined for the same age in paragraph (d)(2)(ii)(C) of this section.

(G) Add the increase in the normalized QJSA determined for each age in paragraph (d)(2)(ii)(E) of this section to the increase in the normalized QSUPP determined for the same age in paragraph (d)(2)(ii)(F) of this section.

(H) Divide the amount determined for each age in paragraph (d)(2)(ii)(G) of this section by the employee's testing compensation.

(I) Select the largest rate determined in paragraph (d)(2)(ii)(H) of this section. This rate is the employee's most valuable accrual rate under the plan for the plan year.

(iii) *Example.* The following example illustrates the annual method in this paragraph (d)(2).

Example. The following table illustrates the determination of the most valuable accrual rate for Employee M in Plan A for the 1994 plan year under the annual method. Employee M has a testing age under Plan A of 65 and testing compensation for the 1994 plan year of $50,000. Plan A does not provide a QSUPP. Step A lists the QJSA payable to Employee M at each age under the plan, determined under paragraph (d)(5)(iii) of this section as if Employee M's benefits under the plan had been frozen as of the last day of the 1994 plan year. Assume that as determined under paragraph (d)(5)(iii) of this section, Employee M is first eligible for a QJSA at age 55. Step B lists the QJSA payable to Employee M at each age under the plan, determined under paragraph (d)(5)(iii) of this section as if Employee M's benefits under the plan had been frozen as of the last day of the 1993 plan year. Steps C and D list the normalized value (as determined under paragraph (d)(5)(iv) of this section) of each QJSA in Steps A and B, respectively. For this purpose, an 8-percent interest rate and the UP-84 mortality table have been applied to normalize each QJSA. Step E lists the difference between steps C and D at each age. (The table skips steps F and G because Plan A does not provide a QSUPP.) Step H lists the result of dividing the difference determined in step E by Employee M's $50,000 testing compensation. Employee M's most valuable accrual rate under Plan A for the 1994 plan year is 2.05 percent, the largest rate listed in step H.

Age	Step A	Step B	Step C	Step D	Step E	Step H
	QJSA as if frozen this year	QJSA as if frozen last year	Normalized QJSA from step A	Normalized QJSA from step B	Step C minus step D	Step E divided by testing compensation (percent)
55	4,293	3,927	12,006	10,983	1,023	2.05
56	4,569	4,180	11,681	10,686	995	1.99
57	4,845	4,432	11,313	10,350	963	1.93
58	5,118	4,682	10,910	9,981	929	1.86
59	5,390	4,931	10,481	9,588	893	1.79
60	5,662	5,180	10,034	9,179	855	1.71
61	6,214	5,685	10,027	9,174	853	1.71
62	6,765	6,188	9,931	9,085	846	1.69
63	7,312	6,689	9,759	8,928	831	1.66

Age	Step A	Step B	Step C	Step D	Step E	Step H
	QJSA as if frozen this year	QJSA as if frozen last year	Normalized QJSA from step A	Normalized QJSA from step B	Step C minus step D	Step E divided by testing compensation (percent)
64	7,857	7,188	9,524	8,713	811	1.62
65	8,400	7,684	9,240	8,452	788	1.58

(3) *Accrued-to-date method*—(i) *Normal accrual rate.* Under the accrued-to-date method, the normal accrual rate for an employee in the plan for a plan year is the percentage amount determined under the following steps—

(A) Determine the employee's accrued benefit as if the employee's benefits under the plan had been frozen as of the last day of the plan year.

(B) Normalize the accrued benefit determined in paragraph (d)(3)(i)(A) of this section.

(C) Divide the normalized accrued benefit determined in paragraph (d)(3)(i)(B) of this section by the employee's testing service.

(D) Divide the amount determined in paragraph (d)(3)(i)(C) of this section by the employee's testing compensation. This rate is the employee's normal accrual rate under the plan for the plan year.

(ii) *Most valuable accrual rate.* Under the accrued-to-date method, the most valuable accrual rate for an employee in the plan for a plan year is the percentage amount determined under the following steps—

(A) Determine the QJSA, and the QSUPP (if any) payable in conjunction with the QJSA, at each age payment of these benefits to the employee could commence under the plan. For this purpose, each QJSA and each QSUPP is determined as if the employee's benefits under the plan had been frozen as of the last day of the plan year.

(B) Normalize each QJSA and each QSUPP determined in paragraph (d)(3)(ii)(A) of this section.

(C) Add the normalized QJSA determined for each age under paragraph (d)(3)(ii)(B) of this section to the normalized QSUPP determined for the same age under paragraph (d)(3)(ii)(B) of this section.

(D) Divide the amount determined for each age in paragraph (d)(3)(ii)(C) of this section by the employee's testing service.

(E) Divide the amount determined for each age in paragraph (d)(3)(ii)(D) of this section by the employee's testing compensation.

(F) Select the largest rate determined in paragraph (d)(3)(ii)(E) of this section. This rate is the employee's most valuable accrual rate under the plan for the plan year.

(iii) *Section 401(a)(17) employees.* The normal and most valuable accrual rates under the accrued-to-date method of all section 401(a)(17) employees in the plan may be determined under the fresh-start alternative for the accrued-to-date method in paragraph (d)(6)(vii) of this section. The preceding sentence applies only if the plan determines the accrued benefits of section 401(a)(17) employees under a fresh start formula that applies solely to such employees, as permitted under § 1.401(a)(17)–1(e)(3)(ii).

(iv) *Examples.* The following examples illustrate the accrued-to-date method in this paragraph (d)(3).

Example 1. The following table illustrates the determination of the most valuable accrual rate for Employee M in Plan A for the 1994 plan year under the accrued-to-date method. Employee M has a testing age under Plan A of 65, testing compensation for the 1994 plan year of $50,000, and 10 years of testing service under Plan A. Plan A does not provide a QSUPP. Step A lists the QJSA payable to Employee M at each age under the plan, determined under paragraph (d)(5)(iii) of this section as if Employee M's benefits under the plan had been frozen as of the last day of the 1994 plan year. Assume that as determined under paragraph (d)(5)(iii) of this section, Employee M is first eligible for a QJSA at age 55. Step B lists the normalized value (as determined under paragraph (d)(5)(iv) of this section) of each QJSA in step A. For this purpose, an 8-percent interest rate and the UP–84 mortality table have been applied to normalize each QJSA. (The table skips step C because Plan A does not provide a QSUPP.) Step D divides the normalized QJSA in step B by Employee M's 10 years of testing service. Step E divides the quotient determined in step D by Employee M's testing compensation of $50,000. Employee M's most valuable accrual rate under Plan A for the 1994 plan year is 2.40 percent, the largest rate listed in step E.

Age	Step A	Step B	Step D	Step E
	QJSA as if frozen this year	Normalized QJSA from step A	Step B divided by testing service	Step D divided by testing compensation (percent)
55	4,293	12,006	1,201	2.40
56	4,569	11,681	1,168	2.34
57	4,845	11,313	1,131	2.26
58	5,118	10,910	1,091	2.18
59	5,390	10,481	1,048	2.10
60	5,662	10,034	1,003	2.01
61	6,214	10,027	1,003	2.01
62	6,765	9,931	993	1.99
63	7,312	9,759	976	1.95
64	7,857	9,524	952	1.90
65	8,400	9,240	924	1.85

Example 2. The facts are the same as in *Example 1,* except that the plan also provides a QSUPP payable for each year until the employee is 62. Employee M's accrued QSUPP is shown in the second column under step A. Employee M's most valuable accrual rate is 3.23 percent, the largest percentage in step E.

Age	Step A		Step B		Step C	Step D	Step E
	QJSA as if frozen this year	QSUPP as if frozen this year	Normalized QJSA from step A	Normalized QSUPP from step A	Normalized QJSA plus normalized QSUPP	Step C divided by testing service	Step D divided by testing compensation (percent)
55	4,293	3,000	12,006	4,152	16,158	1,616	3.23
56	4,569	3,000	11,681	3,422	15,103	1,510	3.02
57	4,845	3,000	11,313	2,746	14,059	1,406	2.81
58	5,118	3,000	10,910	2,117	13,027	1,303	2.61
59	5,390	3,000	10,481	1,533	12,014	1,201	2.40
60	5,662	3,000	10,034	987	11,021	1,102	2.10

Age	Step A		Step B		Step C	Step D	Step E
	QJSA as if frozen this year	QSUPP as if frozen this year	Normalized QJSA from step A	Normalized QSUPP from step A	Normalized QJSA plus normalized QSUPP	Step C divided by testing service	Step D divided by testing compensation (percent)
61	6,214	3,000	10,027	478	10,505	1,051	2.10
62	6,765	0	9,931	0	9,931	993	1.99
63	7,312	0	9,759	0	9,759	976	1.95
64	7,857	0	9,524	0	9,524	952	1.90
65	8,400	0	9,240	0	9,240	924	1.85

(4) *Projected method*—(i) *Normal accrual rate.* Under the projected method, the normal accrual rate for an employee in the plan for a plan year is the percentage amount determined under the following steps—

(A) Determine the employee's accrued benefit as if the employee's benefits under the plan had been frozen as of the employee's testing age.

(B) Normalize the accrued benefit determined in paragraph (d)(4)(i)(A) of this section.

(C) Divide the normalized accrued benefit determined in paragraph (d)(4)(i)(B) of this section by the testing service the employee would have as of the employee's testing age.

(D) Divide the amount determined in paragraph (d)(4)(i)(C) of this section by the employee's testing compensation as of the employee's testing age. This rate is the employee's normal accrual rate under the plan for the plan year.

(ii) *Most valuable accrual rate.* Under the projected method, the most valuable accrual rate for an employee in the plan for a plan year is the percentage amount determined under the following steps—

(A) Determine the QJSA, and the QSUPP (if any) payable in conjunction with the QJSA, at each age payment of these benefits to the employee could commence under the plan. For this purpose, each QJSA and each QSUPP is determined as if the employee's benefits under the plan had been frozen as of the age payment of the QJSA and the QSUPP (if any) to the employee would commence under the plan.

(B) Normalize each QJSA and each QSUPP determined in paragraph (d)(4)(ii)(A) of this section.

(C) Add the normalized QJSA determined for each age under paragraph (d)(4)(ii)(B) of this section to the normalized QSUPP determined for the same age under paragraph (d)(4)(ii)(B) of this section.

(D) Divide the amount determined for each age in paragraph (d)(4)(ii)(C) of this section by the testing service the employee would have as of that age.

(E) Divide the amount determined for each age in paragraph (d)(4)(ii)(D) of this section by the employee's testing compensation as of that age.

(F) Select the largest rate determined in paragraph (d)(4)(ii)(E) of this section. This rate is the employee's most valuable accrual rate under the plan for the plan year.

(iii) *Terminated employees.* In the case of an employee who has terminated employment as of the last day of the current plan year, the employee's normal and most valuable accrual rates under the projected method are determined under the accrued-to-date method in paragraph (d)(3) of this section.

(iv) *Section 401(a)(17) employees.* The normal and most valuable accrual rates under the projected method of all section 401(a)(17) employees in the plan may be determined under the fresh-start alternative for the projected method in paragraph (d)(6)(viii) of this section. The preceding sentence applies only if the plan determines the accrued benefits of section 401(a)(17) employees under a fresh-start formula that applies solely to such employees, as permitted under § 1.401(a)(17)–1(e)(3)(ii).

(v) *Discriminatory pattern of accruals.* The projected method may not be used for a plan year if the pattern of accruals under the plan discriminates in favor of highly compensated employees. The pattern of accruals refers to the manner in which projected benefits actually accrue over the period of accrual (i.e., whether projected benefits accrue in a level manner or in a relatively frontloaded or backloaded manner). A pattern of accruals discriminates in favor of highly compensated employees if the pattern of accruals for the highly compensated employees in the plan is frontloaded when compared to the pattern of accruals for the nonhighly compensated employees in the plan. This determination is made based on all relevant facts and circumstances.

(vi) *Examples.* The following examples illustrate the projected method in this paragraph (d)(4).

Example 1. Employer P maintains a plan under which headquarters employees in the plan accrue a benefit of 1.25 percent of average compensation for the first 10 years of service and 0.75 percent of average compensation for subsequent years of service, while all other employees in the plan accrue a benefit of 1 percent of compensation for all years of service. Assume that the group of headquarters employees in the plan does not satisfy section 410(b). Under these facts, the pattern of accruals under the plan discriminates in favor of highly compensated employees, and therefore, under paragraph (d)(4)(v) of this section, accrual rates under the plan may not be determined under the projected method in this paragraph (d)(4) for the plan year.

Example 2. The following table illustrates the determination of the most valuable accrual rate for Employee M in Plan A for the 1994 plan year under the projected method. Employee M has a testing age under Plan A of 65. Plan A does not provide a QSUPP. Step A lists the QJSA payable to Employee M at each age under the plan, determined under paragraph (d)(5)(iii) of this section as if Employee M's benefits under the plan had been frozen as of each age at which payment of a QJSA would begin. Assume that as determined under paragraph (d)(5)(iii) of this section, Employee M is first eligible for a QJSA at age 60. Step B lists the normalized value (as determined under paragraph (d)(5)(iv) of this section) of each QJSA in step A. For this purpose, an 8-percent interest rate and the UP–84 mortality table have been applied to normalize each QJSA. (The table skips step C because Plan A does not provide a QSUPP.) Step D lists Employee M's projected testing service as of each age and the results of dividing the normalized QJSA in step B by Employee M's projected testing service as of that age. Step E lists Employee M's projected testing compensation as of each age and the results of dividing the quotient in step D by Employee M's projected testing compensation as of that age. Employee M's most valuable accrual rate under Plan A for the 1994 plan year is 1.56 percent, the largest rate listed in step E.

Age	Step A	Step B	Step D		Step E	
	Projected QJSA	Normalized QJSA from step A	Projected testing service	Step B divided by testing service	Projected testing compensation	Step D divided by testing compensation (percent)
60	5,096	9,031	20	452	29,000	1.56
61	5,873	9,476	21	451	32,000	1.41
62	6,697	9,832	22	447	33,000	1.35
63	7,569	10,101	23	439	33,000	1.33
64	8,486	10,286	24	429	33,000	1.30
65	9,450	10,395	25	416	33,000	1.26

(5) *Rules of general application*—(i) *In general.* This paragraph (d)(5) provides rules of general application that must be followed in determining accrual rates under this paragraph (d), regardless of the particular method used to determine those rates. The rules in this paragraph (d)(5) are also used for purposes of determining employee benefit percentages under § 1.410(b)–5(d), equivalent allocation rates under § 1.401(a)(4)–8(c)(2), and whenever a benefit is required to be determined or normalized.

(ii) *Uniformity required.* Accrual rates must be determined in the same manner for all employees in the plan for the plan year. Thus, for example, both the normal accrual rates and the most valuable accrual rates for all employees in the plan for the plan year must be determined under the same method—that is, under either the annual method, the accrued-to-date method, the projected method, the fresh-start alternative for the accrued-to-date method, or the fresh-start alternative for the projected method. See paragraphs (d)(2), (d)(3), (d)(4), (d)(6)(vii), and (d)(6)(viii) of this section, respectively. Similarly, the same actuarial assumptions, as well as the same optional rules under paragraph (d)(6) of this section, must be used in determining the normal accrual rates and the most valuable accrual rates for all employees in the plan for the plan year. No exception to the uniformity requirement in this paragraph (d)(5)(ii) applies unless specifically provided for. Notwithstanding the foregoing, an employer may determine accrual rates differently for purposes of satisfying section 401(a)(4) in different plan years.

(iii) *Determining plan benefits*—(A) *In general.* A benefit payable to an employee in a particular form under a plan is determined under the rules in this paragraph (d)(5)(iii).

(B) *Accrued benefit.* For purposes of determining an employee's accrued benefit, the term "accrued benefit" means the employee's accrued benefit under the plan as defined in section 411(a)(7)(A)(i). If an employee's testing age is later than the employee's normal retirement age under the plan, the term "accrued benefit" means the benefit the employee has (or is projected to have) under the plan as of the date on which the employee's benefits under the plan are treated as frozen, expressed in the form of the benefit the employee would receive under the plan commencing at the employee's testing age. Thus, for example, if a plan with a normal retirement age of 62 has been aggregated with a plan with a normal retirement age of 65, an employee in the first plan who has a normal retirement age of 62 under that plan would nonetheless have a testing age of 65 under the aggregated plan. See paragraph (2) of the definition of testing age in § 1.401(a)(4)–12. Under the rule in this paragraph (d)(5)(iii)(B), such an employee's accrued benefit must be determined based on the benefit the employee would receive under the plan at age 65, including accruals (if applicable) and actuarial increases between ages 62 and 65.

(C) *Benefit accrual service.* An employee's years of service for purposes of benefit accrual under a plan are taken into account through the date on which the employee's benefits under the plan are treated as frozen. If an employee's benefits under the plan are treated as frozen as of a date after the current plan year, the employee's years of service for purposes of benefit accrual under the plan are determined by assuming that the amount of service credited to the employee for that purpose for the current plan year continues to be credited to the employee in each future plan year through the date on which the employee's benefits under the plan are treated as frozen.

(D) *Eligibility service.* An employee's years of service for purposes of determining the employee's eligibility under a plan for a benefit commencing at (or deferred from) a particular age are taken into account through that age. If the employee would reach the age after the current plan year, the employee's years of service for purposes of determining eligibility for the benefit are determined by assuming that the employee earns one year of service for purposes of eligibility in each future plan year through the age.

(E) *Plan compensation.* An employee's compensation from the employer taken into account under the plan's compensation formula is taken into account through the date on which the employee's benefits under the plan are treated as frozen. If an employee's benefits under the plan are treated as frozen as of a date after the current plan year, the employee's compensation for purposes of benefit determination under the plan is determined by assuming that the amount of the employee's compensation for the current plan year taken into account under the plan's compensation formula continues to be earned by the employee in each future plan year through the date on which the employee's benefits under the plan are treated as frozen. Thus, for example, if after the application of section 401(a)(17), an employee's compensation for the current plan year taken into account under the plan's compensation formula is $245,000, it is assumed that the employee continues to earn $245,000 in compensation for each future plan year through the date on which the employee's benefits under the plan are treated as frozen.

(F) *Marital status of employee.* An employee is assumed to be married and to have a spouse of the same age as the employee.

(G) *Benefit computation factors.* Social security benefits and all other relevant factors used to compute benefits under the plan (other than factors described in paragraph (d)(5)(iii)(H) of this section) are assumed to remain constant as in effect on the earlier of the last day of the current plan year or the date on which the employee's benefits under the plan are treated as frozen.

(H) *Benefit computation factors based on variable indices.* If the dollar amount of a benefit accrued or treated as

accrued under section 411(d)(6) is subject to increase by reference to a variable index, the rate of increase determined by reference to the index in each future plan year is assumed to equal the rate of increase determined by reference to the index in the current plan year. Thus, for example, if an employee's normal form of benefit provides a post-retirement cost-of-living adjustment equal to the annual rate of increase in the Consumer Price Index (CPI) and the CPI increased by 4 percent in the current plan year, it is assumed that the CPI will continue to increase by 4 percent in each future plan year. Similarly, if an employee's benefit accrual for a plan year is a fixed percentage of plan year compensation indexed through normal retirement age by reference to the average yield on 30-year Treasury Constant Maturities for the week that includes the first day of each plan year, and the yield for the current plan year is 8 percent, it is assumed that the yield will continue to be 8 percent in each future plan year.

(I) *Benefits commencing at certain ages disregarded.* For purposes of determining an employee's most valuable accrual rate, any benefit commencing before the current plan year or after the employee's testing age is disregarded. Thus, for example, the most valuable accrual rate for an employee who is beyond the otherwise applicable testing age under the plan (i.e., the testing age determined without regard to paragraph (4) of the definition of testing age in § 1.401(a)(4)-12 (current-age rule)) is determined solely by reference to the QJSA commencing in the current plan year.

(iv) *Normalizing plan benefits*—(A) *In general.* A benefit payable to an employee in a particular form under a plan is normalized to an actuarially equivalent straight life annuity commencing at the employee's testing age under the plan as follows—

(*1*) Determine the actuarial present value of all payments under the benefit, as of the date payment of the benefit to the employee would commence under the plan.

(*2*) If the employee's testing age is after the benefit commencement date in paragraph (d)(5)(iv)(A)(*1*) of this section, increase the actuarial present value determined in paragraph (d)(5)(iv)(A)(*1*) of this section by interest for the period from the benefit commencement date in paragraph (d)(5)(iv)(A)(*1*) of this section to the employee's testing age. If the employee's testing age is before the benefit commencement date in paragraph (d)(5)(iv)(A)(*1*) of this section, discount the actuarial present value determined in paragraph (d)(5)(iv)(A)(*1*) of this section by interest from the benefit commencement age in paragraph (d)(5)(iv)(A)(*1*) of this section to the employee's testing age. The interest rate used to make these adjustments may be different from the single interest rate used to determine the actuarial present value in paragraph (d)(5)(iv)(A)(*1*) of this section and the straight life annuity factor in paragraph (d)(5)(iv)(A)(*3*) of this section.

(*3*) Divide the amount determined in paragraph (d)(5)(iv)(A)(*2*) of this section by a straight life annuity factor for the employee's testing age. The resulting quotient is the employee's normalized benefit.

(B) *Actuarial assumptions.* The actuarial assumptions used in normalizing a benefit must be reasonable and must be applied on a gender-neutral basis. A standard interest rate and a standard mortality table are deemed to be reasonable for this purpose. Except as provided in paragraph (d)(5)(iv)(A)(*2*) of this section, the same interest rate and the same mortality table must be used for all purposes under this paragraph (d). For other assumptions (including an employee's marital status and the value of variable indices), see paragraph (d)(5)(iii) of this section.

(C) *Special rule for QSUPPs.* In normalizing a QSUPP, the survivor portion of the QSUPP and any amounts provided under the QSUPP after the employee's normal retirement age under the plan are disregarded.

(v) *Examples.* The following examples illustrate the rules in this paragraph (d)(5).

Example 1. Plan A is a defined benefit plan that includes an early retirement option on or after age 55 for employees who complete 10 years of service with the employer. Employee X currently is age 51 and has completed 5 years of service. Under paragraph (d)(5)(iii)(D) of this section, Employee X is assumed to continue to earn one year of retirement eligibility service in each future plan year. Under this assumption, Employee X will first meet the eligibility requirements for the early retirement option at age 56, when Employee X will have completed 10 years of service. Thus, in determining Employee X's most valuable accrual rate, the first QJSA payable to Employee X under Plan A would commence at age 56.

Example 2. (a) Under Plan B, benefits for unmarried employees are paid in the form of a straight life annuity commencing at a normal retirement age of 65. Plan B further provides that a married employee will be paid benefits in the form of an actuarially equivalent QJSA commencing at the same age. The conversion factor used to determine the QJSA is a function of the employee's age and the age of the employee's spouse. For an employee with a spouse the same age as the employee, the conversion factor is 0.92 at age 55 and decreases in a straight line to a value of 0.90 at age 65.

(b) Plan B permits an employee who has completed 10 years of service to retire on or after age 55 and to receive a reduced early retirement benefit. The amount of the reduction is 6.67 percent for each of the first 5 years that an employee's benefit commencement date precedes normal retirement age and 3.33 percent for each of the next 5 years that an employee's benefit commencement precedes age 60.

(c) Employee Y is a participant in Plan B. Employee Y is 50 years old and has 10 years of service. If Employee Y's benefits under Plan B were frozen as of the last day of the current plan year, Employee Y would have an accrued benefit of $9,333. The QJSA payable at each potential age that benefits could commence to Employee Y under the plan is determined under the following table. For this purpose, Employee Y is assumed under paragraph (d)(5)(iii)(F) of this section to be married and to have a spouse of the same age.

Age	Early retirement factor (percent)	Joint & survivor factor (percent)	Frozen accrued benefit	QJSA benefit payable
55	50.00	92.00	9,333	4,293
56	53.33	91.80	9,333	4,569
57	56.67	91.60	9,333	4,845
58	60.00	91.40	9,333	5,118
59	63.33	91.20	9.333	5,390
60	66.67	91.00	9,333	5,662
61	73.33	90.80	9,333	6,214
62	80.00	90.60	9,333	6,765
63	86.67	90.40	9,333	7,312
64	93.33	90.20	9,333	7,857
65	100.00	90.00	9,333	8,400

Example 3. A 50-percent QJSA of $1,200, payable in monthly installments of $100 each to Employee A commencing at age 62, is normalized under paragraph (d)(5)(iv) of this section to an actuarially equivalent straight life annuity commencing at Employee A's testing age of 65 by using an 8-percent interest rate and the UP–84 mortality table, under the following steps. Regardless of Employee A's marital status, under paragraphs (d)(5)(iii)(F) and (d)(5)(iv)(B) of this section, Employee A is assumed to have a spouse who is the same age as Employee A.

(a) The actuarial present value of the QJSA at age 62 is $11,462.

(b) The actuarial present value determined in paragraph (a) of this *Example 3* as of age 62 is increased by interest for the period from age 62 to age 65, resulting in a value at age 65 of $14,439.

(c) The amount determined in paragraph (b) of this *Example 3* is divided by a straight life annuity factor of 8.1958 for age 65. The resulting quotient (a straight life annuity of $1,762) is the employee's normalized QJSA.

Example 4. The facts are the same as in *Example 3*, except that Employee A is also entitled to a $600 annual QSUPP payable in equal monthly payments of $50 beginning at age 55 and continuing until Employee A's social security retirement age. The QSUPP is normalized to an actuarially equivalent straight life annuity under the following steps.

(a) The actuarial present value of the QSUPP at age 55 is $3,996. This actuarial present value excludes the value of payments that may be made under the QSUPP to Employee A's spouse if Employee A were to die before receiving all the scheduled payments under the QSUPP and the value of any payments that extend beyond Employee A's normal retirement date under the plan.

(b) The actuarial present value determined in paragraph (a) of this *Example 4* as of age 55 is increased by interest for the period from age 55 to age 65, resulting in a value at age 65 of $8,627.

(c) The amount determined in paragraph (b) of this *Example 4* is divided by a straight life annuity factor of 8.1958 for age 65. The resulting quotient (a straight life annuity of $1,053) is Employee A's normalized QSUPP.

Example 5. The facts are the same as in *Example 3*, except that Employee A's accrued benefit is payable as a life annuity of $12,000, payable in monthly installments of $1,000 per month beginning at the plan's normal retirement age of 65, with an automatic cost-of-living adjustment after normal retirement date. In the current plan year, the index that determines the automatic cost-of-living adjustment increased by 4 percent. Employee A's life annuity is normalized to an actuarially equivalent straight life annuity beginning at age 65 under the following steps.

(a) The actuarial present value of the life annuity at age 65 is $129,260. This actuarial present value reflects future annual increases of 4 percent under the plan's automatic cost-of-living adjustment after normal retirement date.

(b) The actuarial present value determined in paragraph (a) of this *Example 5* as of age 65 is neither increased nor discounted for interest, because the benefit commencement date and the employee's testing age are both age 65.

(c) The amount determined in paragraph (b) of this *Example 5* is divided by a straight life annuity factor of 8.1958 for age 65. The resulting quotient (a straight life annuity of $15,772) is Employee A's normalized accrued benefit.

Example 6. A life annuity of $12,000, payable in monthly installments of $1,000 each to Employee B commencing at age 68, is normalized under paragraph (d)(5)(iv) of this section to an actuarially equivalent straight life annuity commencing at Employee B's testing age of 65 by using an 8-percent interest rate and the UP–84 mortality table, under the following steps.

(a) The actuarial present value of the annuity at age 68 is $91,211.

(b) The actuarial present value determined in paragraph (a) of this *Example 6* as of age 68 is discounted by interest for the period from age 68 to age 65, resulting in a value at age 65 of $72,406.

(c) The amount determined in paragraph (b) of this *Example 6* is divided by a straight life annuity factor of 8.1958 for age 65. The resulting quotient (a straight life annuity of $8,835) is Employee B's normalized QJSA.

Example 7. (a) Plan B is a defined benefit plan with a benefit formula of 2 percent of average annual compensation less 1.5 percent of the employee's primary social security benefit per year of service. Plan B has a calendar plan year. Average annual compensation is defined as the average of the annual compensation for the 3 consecutive plan year period over an employee's career in which the average is highest. Employee B has 5 years of testing service as of the calendar plan year 2000 and the following annual compensation: 1996—$15,000, 1997–$20,000, 1998—$24,000, 1999–$30,000, 2000–$33,000.

(b) Accrual rates for Plan B are being determined under the projected method of paragraph (d)(4) of this section for the year 2000. For purposes of projecting accrued benefits as of a date after the year 2000, the annual compensation for the year 2000 is assumed to continue into the future. See paragraph (d)(5)(iii)(E) of this section. Thus, in order to determine Employee B's QJSA as if Employee B's benefits under the plan were frozen as of the end of the year 2000, Employee B's average annual compensation is the average for the years 1998–2000, or $29,000. In order to determine Employee B's QJSA as if Employee B's benefits under the plan were frozen as of the end of the year 2001, Employee B's average annual compensation is the average for the years 1999–2001, or $32,000 (the average of $30,000, $33,000, and $33,000). In order to determine Employee B's QJSA as if Employee B's benefits under the plan were frozen as of the end of the year 2002 or a later year, Employee B's average annual compensation is $33,000.

(c) In order to determine the primary social security benefit offset in the plan formula, the factors required to determine a primary social security benefit are not assumed to change in the future. See paragraph (d)(5)(iii)(G) of this section. Thus, for example, if accrual rates are being determined in the year 2000 based on benefits determined as if frozen at a year after the year 2000, the taxable wage base for the year 2000 is assumed to remain constant.

Example 8. Employer A maintains a defined benefit plan. An employee's normal retirement benefit under the plan equals 1 percent of compensation times years of service. The plan provides for five-year cliff vesting as permitted under section 411(a)(2)(A). Because the definition of compensation under the plan does not satisfy section 414(s), the plan must be tested under the general test of paragraph (c) of this section. In anticipation of the plan's failure to satisfy the general test, Employer A amends the plan to add a minimum benefit equal to 5 percent of compensation, so that following the amendment an employee's normal retirement benefit equals the greater of—

(A) 1 percent of compensation times years of service, or

(B) 5 percent of compensation.

Because the normal retirement benefit of a vested participant with 5 or more years of service would be at least 5 percent of compensation even without regard to the minimum benefit, the minimum benefit does not provide meaningful benefits to vested participants. It therefore would be inconsistent with the purpose of preventing discrimination in favor of highly compensated employees to take the minimum benefit into account in determining accrual rates under this paragraph (d). See § 1.401(a)(4)–1(c)(2).

(6) *Optional rules for calculating accrual rates*—(i) *In general.* This paragraph (d)(6) provides optional rules that may be applied in determining accrual rates under this paragraph (d). If any optional rule is applied to a plan for a plan year, the rule must be applied to determine accrual rates for all employees in the plan for the plan year, unless otherwise provided.

(ii) *Imputation of permitted disparity.* The disparity permitted under section 401(*l*) may be imputed in accordance with the rules of § 1.401(a)(4)–7.

(iii) *Expressing accrual rates as dollar amounts.* Accrual rates may be expressed as a dollar amount rather than as a percentage of testing compensation. Accrual rates that are expressed as a dollar amount are determined without taking into account any requirement in this paragraph (d) that calls for expressing any amount as a percentage of testing compensation, dividing any amount by testing compensation, or multiplying any amount by testing compensation. For example, under the annual method, an employee's normal accrual rate would be determined by subtracting the employee's normalized accrued benefit (determined as if frozen as of the last day of the prior plan year) from the employee's normalized accrued benefit (determined as if frozen as of the last day of the plan year), without dividing

the difference by the employee's testing compensation for the plan year.

(iv) *Grouping of accrual rates*—(A) *In general.* An employer may treat all employees who have accrual rates within a range of no more than 5 percent (not 5 percentage points) above and below a midpoint rate chosen by the employer as having an accrual rate equal to that midpoint rate. If accrual rates are determined as a percentage of testing compensation, an employer may, as an alternative, treat all employees who have accrual rates within a range of no more than one-twentieth of a percentage point above and below a midpoint rate chosen by the employer as having an accrual rate equal to that midpoint rate. Accrual rates within a given range may be grouped under this paragraph (d)(6)(iv) only if the accrual rates of highly and nonhighly compensated employees are dispersed throughout the range in a reasonably comparable manner and the range does not overlap with any other range chosen by the employer. An employer may choose to group the accrual rates of some employees into ranges and not to group the accrual rates of other employees into ranges, provided that the accrual rates of all employees within each range chosen by the employer are grouped within that range. If accrual rates are determined as a percentage of testing compensation, an employer may apply either grouping method described in this paragraph (d)(6)(iv) and, in addition, may apply one method to one group of employees and the other method to another group of employees, provided that only one method is applied to any given employee or group of employees. An employer may also choose to apply these grouping rules in one manner (or not all all) for normal accrual rates and in another manner (or not at all) for most valuable accrual rates.

(B) *Examples.* The following examples illustrate the grouping rules in this paragraph (d)(6)(iv).

Example 1. The employees in Plan A have the following accrual rates (expressed as a percentage of testing compensation): 1.9 percent, 2.0 percent, and 2.1 percent. Because all employees have accrual rates within a range of no more than 5 percent above or below 2.0 percent (a midpoint rate chosen by the employer), the employer may treat all employees in Plan A as having an accrual rate of 2.0 percent (provided, of course, that the accrual rates of highly compensated employees and nonhighly compensated employees are dispersed throughout the range in a reasonably comparable manner).

Example 2. The employees in Plan B have the following accrual rates (expressed as percentage of testing compensation): 0.8 percent, 0.83 percent, 0.9 percent, 1.9 percent, 2.0 percent, and 2.1 percent. Because the first three rates are within a range of no more than one-twentieth of a percentage point above or below 0.85 percent (a midpoint rate chosen by the employer), the employer may treat the employees who have those rates as having an accrual rate of 0.85 percent (provided that the accrual rates of highly compensated employees and nonhighly compensated employees are dispersed throughout the range in a reasonably comparable manner). Because the last three rates are within a range of no more than 5 percent above or below 2.0 percent (a midpoint rate chosen by the employer), the employer may treat the employees who have those rates as having an accrual rate of 2.0 percent (provided that the accrual rates of highly compensated employees and nonhighly compensated employees are dispersed throughout the range in a reasonably comparable manner).

(v) *Floor on most valuable accrual rate*—(A) *In general.* In determining an employee's most valuable accrual rate under this paragraph (d), the employer may substitute for the employee's actual most valuable accrual rate for the current plan year, the employee's highest most valuable accrual rate determined for any plan year in a period of consecutive plan years. The period of consecutive plan years must begin with any prior plan year selected by the employer that is the same for all employees in the plan (except as otherwise provided below), and must end with and include the current plan year. This paragraph (d)(6)(v) is available to determine the most valuable accrual rate of an employee only if the following requirements are satisfied—

(*1*) There has been no plan amendment effective during the period that affects the determination of the most valuable accrual rate of any employee in the plan.

(*2*) The employee's normal accrual rates for all plan years in the period were determined in the same manner, and the employee's most valuable accrual rates for all plan years in the period were determined in the same manner. The employee's normal and most valuable accrual rates for all prior plan years may be redetermined to meet this requirement. Most valuable accrual rates do not fail to be determined in the same manner merely because the option in this paragraph (d)(6)(v) is not applied in any one or more of the prior plan years in the period.

(*3*) The employee's normal accrual rates for all plan years in the period fall within a range that would be permitted to be grouped at a single midpoint rate under the grouping rules of paragraph (d)(6)(iv) of this section if the employee's normal accrual rates were the only rates in the plan for a plan year. If this requirement is not satisfied for the employee, the earliest plan year in the period must be disregarded for purposes of applying this paragraph (d)(6)(v) to the employee. The rule in the preceding sentence must be applied repeatedly until the requirement in this paragraph (d)(6)(v)(A)(*3*) is satisfied. For purposes of this paragraph (d)(6)(v)(A)(*3*), an employee's normal accrual rates are determined in accordance with paragraph (d)(6)(v)(A)(*2*) of this section and without applying the grouping rules under paragraph (d)(6)(iv) of this section.

(B) *Examples.* The following examples illustrate this paragraph (d)(6)(v).

Example 1. Under Plan A, Employee X has the following normal accrual rates in the current plan year and the immediately preceding 5 plan years: 1.9 percent, 1.95 percent, 2.0 percent, 2.1 percent, 2.05 percent, and 2.05 percent. For each of those years, Employee X has the following most valuable accrual rates: 3.0 percent, 2.6 percent, 2.7 percent, 2.9 percent, 2.8 percent, and 2.8 percent. The normal and most valuable accrual rates for all plan years in the period of consecutive plan years have been determined in the same manner. In addition, the plan has not been amended during the period of consecutive years in a manner that would affect the determination of the most valuable accrual rate of any employee in the plan. The employer applies the option in this paragraph (d)(6)(v) for all employees. Employee X's normal accrual rates in the current and preceding 5 plan years are no more than 5 percent above or below 2.0 percent (a midpoint rate chosen by the employer) and thus are within a range of rates that would be permitted to be grouped at a single midpoint rate under the grouping rules of paragraph (d)(6)(iv) of this section if the employee's normal accrual rates were the only rates in the plan for a plan year. Therefore, the employer may treat Employee X's most valuable accrual rate as 3.0 percent for the current plan year.

Example 2. The facts are the same as in *Example 1*, except that Employee X's normal accrual rate in the 5th preceding plan year is 2.5 percent. Due to the greater dispersion of Employee X's normal accrual rates within the period, they may not be grouped at a single midpoint rate chosen by the employer. Under paragraph (d)(6)(v)(A)(*3*) of this section, the earliest plan year in the period must therefore be disregarded. As a result, only Employee X's normal and most valuable accrual rates for the current and the 4 preceding plan years are taken into account. After applying the analysis in *Example 1* to this shorter period, the employer may treat Employee X's most valuable accrual rate as 2.9 percent for the current plan year.

(vi) *Adjustment in most valuable accrual rate for certain disability benefits provided under the plan*—(A) *In general.* An employer may adjust an employee's most valuable accrual rate

to reflect the value of certain disability benefits that are currently available to the employee under the plan (within the meaning of § 1.401(a)(4)–4(b)(2)).

(B) *Includible disability benefits.* A disability benefit may be taken into account under this paragraph (d)(6)(vi) only if the following requirements are satisfied—

(*1*) The disability benefit is equal to the maximum qualified disability benefit (within the meaning of section 411(a)(9)).

(*2*) The employee is treated as disabled under the plan if the employee is unable to perform the duties of the employee's usual occupation.

(*3*) The actual experience of the employer or the nature of the work being performed by employees covered by the disability benefit (i.e., the likelihood of employment-related disability) indicates that it is a meaningful and significant benefit.

(C) *Adjustment.* The value of the disability benefit is taken into account by multiplying the employee's most valuable accrual rate by 1.11. This factor is applied before imputing permitted disparity under § 1.401(a)(4)–7, and before grouping accrual rates under paragraph (d)(6)(iv) of this section.

(D) *Example.* The following example illustrates this paragraph (d)(6)(vi).

Example. Employer A maintains Plan X. Plan X provides a disability benefit for all employees who work in Employer A's underground coal mines and who suffer an employment-related disability. Under these facts, the disability benefit is a meaningful and significant benefit.

(vii) *Fresh-start alternative for accrued-to-date method*—(A) *In general.* The accrued-to-date method may be applied solely with respect to benefits accrued and testing service in plan years beginning after a fresh-start date. This alternative may be applied only if the plan satisfies the fresh-start rules of § 1.401(a)(4)–13(c) with respect to the fresh-start date.

(B) *Normal accrual rate.* Under the fresh-start alternative for the accrued-to-date method, the normal accrual rate for an employee in the plan for a plan year is the percentage amount determined under the following steps—

(*1*) Determine the employee's accrued benefit as if the employee's benefits under the plan had been frozen as of the last day of the plan year.

(*2*) Determine the employee's accrued benefit frozen in accordance with § 1.401(a)(4)–13(c) as of the fresh-start date and adjusted, if applicable, in accordance with § 1.401(a)(4)–13(c)(5)(iii) (but not § 1.401(a)(4)–13(c)(6)(ii)) through the last day of the current plan year.

(*3*) Normalize the accrued benefit determined in paragraph (d)(6)(vii)(B)(*1*) of this section.

(*4*) Normalize the accrued benefit determined in paragraph (d)(6)(vii)(B)(*2*) of this section.

(*5*) Subtract the normalized accrued benefit determined in paragraph (d)(6)(vii)(B)(*4*) of this section from the normalized accrued benefit determined in paragraph (d)(6)(vii)(B)(*3*) of this section.

(*6*) Divide the amount determined in paragraph (d)(6)(vii)(B)(*5*) of this section by the employee's testing service since the fresh-start date.

(*7*) Divide the amount determined in paragraph (d)(6)(vii)(B)(*6*) of this section by the employee's testing compensation for the plan year. This rate is the employee's normal accrual rate under the plan for the plan year.

(C) *Most valuable accrual rate.* Under the fresh-start alternative for the accrued-to-date method, the most valuable accrual rate for an employee in the plan for a plan year is the percentage amount determined under the following steps—

(*1*) Determine the QJSA, and the QSUPP (if any) payable in conjunction with the QJSA, at each age payment of these benefits to the employee could commence under the plan. For this purpose, each QJSA and each QSUPP is determined as if the employee's benefits under the plan had been frozen as of the last day of the plan year.

(*2*) Determine the QJSA, and the QSUPP (if any) payable in conjunction with the QJSA, at each age payment of these benefits to the employee could commence under the plan. For this purpose, the QJSA and the QSUPP are frozen (along with the employee's other benefits under the plan) in accordance with § 1.401(a)(4)–13(c) as of the fresh-start date and adjusted, if applicable, in accordance with § 1.401(a)(4)–13(c)(5)(iii) (but not § 1.401(a)(4)–13(c)(6)(ii)) through the last day of the current plan year.

(*3*) Normalize each QJSA and each QSUPP determined in paragraph (d)(6)(vii)(C)(*1*) of this section.

(*4*) Normalize each QJSA and each QSUPP determined in paragraph (d)(6)(vii)(C)(*2*) of this section.

(*5*) Subtract the normalized QJSA determined for each age in paragraph (d)(6)(vii)(C)(*4*) of this section from the normalized QJSA determined for the same age in paragraph (d)(6)(vii)(C)(*3*) of this section.

(*6*) Subtract the normalized QSUPP determined for each age under paragraph (d)(6)(vii)(C)(*4*) of this section from the normalized QSUPP determined for the same age under paragraph (d)(6)(vii)(C)(*3*) of this section.

(*7*) Add the increase in the normalized QJSA determined for each age in paragraph (d)(6)(vii)(C)(*5*) to the increase in the normalized QSUPP determined for the same age in paragraph (d)(6)(vii)(C)(*6*) of this section.

(*8*) Divide the amount determined for each age in paragraph (d)(6)(vii)(C)(*7*) of this section by the employee's testing service since the fresh-start date.

(*9*) Divide the amount determined in paragraph (d)(6)(vii)(C)(*8*) of this section by the employee's testing compensation.

(*10*) Select the largest rate determined in paragraph (d)(6)(vii)(C)(*9*) of this section. This rate is the employee's most valuable accrual rate under the plan for the plan year.

(D) *Examples.* The following examples illustrate the fresh-start alternative for the accrued-to-date method.

Example 1. The following table illustrates the determination of the most valuable accrual rate for Employee M in Plan A for the 1994 plan year under the fresh-start alternative to the accrued-to-date method. Employee M has a testing age under Plan A of 65, testing service of 5 years since the fresh-start date, and testing compensation for the 1994 plan year of $50,000. Plan A does not provide a QSUPP. Step 1 lists the QJSA payable to Employee M at each age under the plan, determined under paragraph (d)(5)(iii) of this section as if Employee M's benefits under the plan had been frozen as of the last day of the 1994 plan year. Assume that as determined under paragraph (d)(5)(iii) of this section, Employee M is first eligible for a QJSA at age 55. Step 2 lists the QJSA payable to Employee M at each age under the plan, determined under paragraph (d)(5)(iii) of this section, frozen in accordance with § 1.401(a)(4)–13(c), and adjusted in accordance with § 1.401(a)(4)–13(c)(5)(iii) through the last day of the current plan year. Steps 3 and 4 list the normalized value (as determined under paragraph (d)(5)(iv) of this section) of each QJSA in Steps 1 and 2, respectively. For this purpose, an 8-percent interest rate and the UP–84 mortality table have been applied to normalize each QJSA. Step 5 lists the difference between steps 3 and 4 at each age. (The table skips steps 6 and 7 because Plan A does not provide a QSUPP.) Step 8 divides the difference in step 5 by Employee M's 5 years of testing service since the fresh-start date. Step 9 divides the quotient determined in step 8 by Employee M's testing compensation of $50,000. Employee M's most valuable accrual rate under Plan A for the 1994 plan year is 3.36 percent, the largest rate listed in step 9.

	Step 1	Step 2	Step 3	Step 4	Step 5	Step 8	Step 9
	QJSA as if frozen in current year	Actual frozen QJSA as of fresh-start date	Normalized QJSA from Step 1	Normalized QJSA from Step 2	Step 3 minus Step 4	Step 5 divided by testing service since fresh-start date	Step 8 divided by testing compensation (percent)
55	4,293	1,288	12,006	3,602	8,404	1,681	3.36
56	4,569	1,371	11,681	3,504	8,177	1,635	3.27
57	4,845	1,453	11,313	3,394	7,919	1,584	3.17
58	5,118	1,535	10,910	3,273	7,637	1,527	3.05
59	5,390	1,617	10,481	3,144	7,337	1,467	2.93
60	5,662	1,699	10,034	3,010	7,024	1,405	2.81
61	6,214	1,864	10,027	3,008	7,019	1,404	2.81
62	6,765	2,029	9,931	2,979	6,952	1,390	2.78
63	7,312	2,194	9,759	2,928	6,831	1,366	2.73
64	7,857	2,357	9,524	2,857	6,667	1,333	2.67
65	8,400	2,520	9,240	2,772	6,468	1,294	2.59

Example 2. The facts are the same as in *Example 1*, except that the plan has been amended since the fresh-start date to improve the factor used to calculate the QJSA. The new factor applies to benefits accrued both before and after the fresh-start date, as permitted under § 1.401(a)(4)-13(c)(6)(ii). Although this change increases the QJSA determined with respect to benefits accrued prior to the fresh-start date, the frozen QJSA determined as of the fresh-start date and adjusted through the last day of the current plan year under paragraph (d)(6)(vii)(B)(*2*) of this section does not include the increase in benefits attributable to the new QJSA factor and thus must be determined using the original factor provided in the plan.

(viii) *Fresh-start alternative for projected method*—(A) *In general.* The projected method may be applied solely with respect to benefits accrued and testing service in plan years beginning after a fresh-start date. This alternative may be applied only if the plan satisfies the fresh-start rules of § 1.401(a)(4)–13(c) with respect to the fresh-start date.

(B) *Normal accrual rate.* Under the fresh-start alternative for the projected method, the normal accrual rate for an employee in the plan for a plan year is the percentage amount determined under the following steps—

(*1*) Determine the employee's accrued benefit as if the employee's benefits under the plan had been frozen as of the employee's testing age.

(*2*) Determine the employee's accrued benefit frozen in accordance with § 1.401(a)(4)–13(c) as of the fresh-start date and adjusted, if applicable, in accordance with § 1.401(a)(4)–13(c)(5)(iii) (but not § 1.401(a)(4)–13(c)(6)(ii)) through the last day of the current plan year.

(*3*) Normalize the accrued benefit determined in paragraph (d)(6)(viii)(B)(*1*) of this section.

(*4*) Normalize the accrued benefit determined in paragraph (d)(6)(viii)(B)(*2*) of this section.

(*5*) Subtract the normalized accrued benefit determined in paragraph (d)(6)(viii)(B)(*4*) of this section from the normalized accrued benefit determined in paragraph (d)(6)(viii)(B)(*3*) of this section.

(*6*) Divide the amount determined in paragraph (d)(6)(viii)(B)(*5*) of this section by the testing service since the fresh-start date the employee would have as of the employee's testing age.

(*7*) Divide the amount determined in paragraph (d)(6)(viii)(B)(*6*) of this section by the employee's testing compensation as of the employee's testing age. This rate is the employee's normal accrual rate under the plan for the plan year.

(C) *Most valuable accrual rate.* Under the fresh-start alternative for the projected method, the most valuable accrual rate for an employee in the plan for a plan year is the percentage amount determined under the following steps—

(*1*) Determine the QJSA, and the QSUPP (if any) payable in conjunction with the QJSA, at each age payment of these benefits to the employee could commence under the plan. For this purpose, each QJSA and each QSUPP is determined as if the employee's benefits under the plan had been frozen as of the age payment of the QJSA and the QSUPP (if any) to the employee would commence under the plan.

(*2*) Determine the QJSA, and the QSUPP (if any) payable in conjunction with the QJSA, at each age payment of these benefits to the employee could commence under the plan. For this purpose, the QJSA and the QSUPP are frozen (along with the employee's other benefits under the plan) in accordance with § 1.401(a)(4)–13(c) as of the fresh-start date and adjusted, if applicable, in accordance with § 1.401(a)(4)–13(c)(5)(iii) (but not § 1.401(a)(4)–13(c)(6)(ii)) through the last day of the current plan year.

(*3*) Normalize each QJSA and each QSUPP determined in paragraph (d)(6)(viii)(C)(*1*) of this section.

(*4*) Normalize each QJSA and each QSUPP determined in paragraph (d)(6)(viii)(C)(*2*) of this section.

(*5*) Subtract the normalized QJSA determined for each age in paragraph (d)(6)(viii)(C)(*4*) of this section from the normalized QJSA determined for the same age in paragraph (d)(6)(viii)(C)(*3*) of this section.

(*6*) Subtract the normalized QSUPP determined for each age under paragraph (d)(6)(viii)(C)(*4*) of this section from the normalized QSUPP determined for the same age under paragraph (d)(6)(viii)(C)(*3*) of this section.

(*7*) Add the increase in the normalized QJSA determined for each age in paragraph (d)(6)(viii)(C)(*5*) of this section to the increase in the normalized QSUPP determined for the same age in paragraph (d)(6)(viii)(C)(*6*) of this section.

(*8*) Divide the amount determined for each age in paragraph (d)(6)(viii)(C)(*7*) of this section by the testing service since the fresh-start date the employee would have as of that age.

(*9*) Divide the amount determined for each age in paragraph (d)(6)(viii)(C)(*8*) of this section by the employee's testing compensation as of that age.

(*10*) Select the largest rate determined in paragraph (d)(6)(viii)(C)(*9*) of this section. This rate is the employee's most valuable accrual rate under the plan for the plan year.

(D) *Terminated employees.* Notwithstanding the foregoing, in the case of an employee who has terminated employment as of the last day of the current plan year, the employee's normal and most valuable accrual rates under the fresh-start alternative for the projected method are determined under the fresh-start alternative for the accrued-to-date method in paragraph (d)(6)(vii) of this section.

(E) *Discriminatory pattern of accruals.* Paragraph (d)(4)(v) of this

section prohibits use of the projected method if the pattern of accruals under the plan discriminates in favor of highly compensated employees. The same prohibition applies to use of the fresh-start alternative for the projected method, except that only the pattern of accruals under the plan after the fresh-start date is taken into account.

(F) *Example.* The rules in this paragraph (d)(6)(viii) are illustrated in the following example.

Example. The following table illustrates the determination of the most valuable accrual rate for Employee M in Plan A for the 1994 plan year under the fresh-start alternative for the projected method. Employee M has a testing age under Plan A of 65. Plan A does not provide a QSUPP. Step 1 lists the QJSA payable to Employee M at each age under the plan, determined under paragraph (d)(5)(iii) of this section as if Employee M's benefits under the plan had been frozen as of each age at which payment of the QJSA would begin. Assume that, as determined under paragraph (d)(5)(iii) of this section, Employee M is first eligible for a QJSA at age 60. Step 2 lists the QJSA payable to Employee M at each age under the plan, determined under paragraph (d)(5)(iii) of this section, frozen in accordance with § 1.401(a)(4)–13(c), and adjusted in accordance with § 1.401(a)(4)–13(c)(5)(iii) through the last day of the current plan year. Steps 3 and 4 list the normalized value (as determined under paragraph (d)(5)(iv) of this section) of each QJSA in steps 1 and 2, respectively. For this purpose, an 8-percent interest rate and the UP–84 mortality table have been applied to normalize each QJSA. Step 5 lists the difference between steps 3 and 4 at each age. (The table skips steps 6 and 7 because Plan A does not provide a QSUPP.) Step 8 lists Employee M's projected testing service since the fresh-start date as of each age and the results of dividing the difference in step 5 by Employee M's projected testing service since the fresh-start date as of that age. Step 9 lists Employee M's projected testing compensation as of each age and the results of dividing the quotient in step 8 by Employee M's projected testing compensation as of that age. Employee M's most valuable accrual rate under Plan A for the 1994 plan year is 1.96 percent, the largest rate listed in step 9.

	Step 1	Step 2	Step 3	Step 4	Step 5	Step 8		Step 9	
	Projected QJSA	Frozen QJSA	Normalized QJSA from Step 1	Normalized QJSA from Step 2	Step 3 Minus Step 4	Projected Testing Service Since Fresh-Start Date	Step 5 Divided by Testing Service	Projected Testing Compensation	Step 8 Divided by Testing Compensation (percent)
60	5,096	1,895	9,031	3,358	5,673	10	567	29,000	1.96
61	5,873	2,060	9,476	3,357	6,119	11	556	32,000	1.74
62	6,697	2,264	9,832	3,324	6,508	12	542	33,000	1.64
63	7,569	2,448	10,101	3,267	6,834	13	526	33,000	1.59
64	8,486	2,630	10,286	3,188	7,098	14	507	33,000	1.54
65	9,450	2,812	10,395	3,093	7,302	15	487	33,000	1.48

(e) *Compensation rules*—(1) *In general.* This paragraph (e) provides rules for determining average annual compensation and testing compensation for the employees in a plan for a plan year. Safe harbor plans that satisfy paragraph (b) of this section must determine benefits either as a dollar amount unrelated to employees' compensation or as a percentage of each employees's average annual compensation. For safe harbor plans that determine benefits as a percentage of each employee's average annual compensation, paragraph (e)(2) of this section provides the rules for determining the average annual compensation of each employee in the plan. Plans that do not satisfy one of the safe harbors in paragraph (b) of this section, and that instead satisfy this section under the general test of paragraph (c) of this section, are not required under this section to determine benefits under any particular definition of compensation or in any particular manner. However, the accrual rates used in testing these plans under the general test of paragraph (c) of this section must be expressed either as a dollar amount or as a percentage of each employee's testing compensation for the plan year. Paragraph (e)(3) of this section provides the rules for determining the testing compensation of each employee in the plan for the plan year.

(2) *Average annual compensation.* "Average annual compensation" means the average of an employee's annual section 414(s) compensation determined over the averaging period in the employee's compensation history during which the average of the employee's annual section 414(s) compensation is the highest. For this purpose, an averaging period must consist of 3 or more consecutive 12-month periods (or, if shorter, the employee's period of employment). In addition, each employee's compensation history must end in the current plan year and must include 10 or more consecutive 12-month periods. However, an employee's compensation history need not be longer than the longer of the employee's period of testing service or the employee's averaging period. Finally, the averaging period and the compensation history for all employees in the plan must be determined in a consistent manner.

(3) *Testing compensation*—(i) *In general.* "Testing compensation" means either average annual compensation or plan year compensation, modified (if applicable) in accordance with paragraph (e)(3) (ii) or (iii) of this section. The testing compensation for all employees in the plan must be determined in a consistent manner. If accrual rates are determined by imputing permitted disparity as allowed under paragraph (d)(6)(ii) of this section, see § 1.401(a)(4)–7(c)(4)(v) for limitations on testing compensation.

(ii) *Certain modifications to plan year compensation.* If accrual rates are being determined under any method other than the annual method in paragraph (d)(2) of this section, the following modifications to the plan year compensation must be made—

(A) Plan year compensation must be determined during the period specified in paragraph (3) of the definition of plan year compensation in § 1.401(a)(4)–12 (i.e., a 12-month period ending with or within the current plan year).

(B) In the case of employees who do not have section 414(s) compensation during at least 11 months within the 12-month period specified in paragraph (3) of the definition of plan year compensation in § 1.401(a)(4)–12 by reason of termination of employment or absence from service, the 12-month period used to determine plan year compensation must be either—

(*1*) The 12-month period ending on the employee's termination of employment or absence from service, or

(*2*) The 12-month period immediately preceding the period used to determine the plan year compensation of all other employees in the plan.

(iii) *Certain modifications to average annual compensation.* If accrual rates

are being determined under the projected method in § 1.401(a)(4)–3(d)(4) or the fresh-start alternative for the projected method in § 1.401(a)(4)–3(d)(6)(viii), the following modifications in determining average annual compensation must be made—

(A) An employee's average annual compensation must be determined as of each date (other than the fresh-start date, if applicable) that the employee's benefits under the plan are treated as frozen.

(B) If an employee's benefits under the plan are treated as frozen as of a date after the current plan year, the employee's compensation history must be projected through the future plan year in which the employee's benefits under the plan are treated as frozen, in addition to the period of compensation history ending in the current plan year described in paragraph (e)(2) of this section.

(C) In determining the employee's projected compensation history as of any date after the 12-month period ending in the current plan year, it must be assumed that the employee continues to earn in each future 12-month period in the employee's projected compensation history the same amount of annual section 414(s) compensation that the employee earned in the 12-month period in the employee's compensation history ending in the current plan year.

(4) *Examples.* The rules of this paragraph (e) are illustrated by the following examples.

Example 1. Employer X maintains a defined benefit plan (Plan A). In testing whether the benefits provided under Plan A satisfy section 401(a)(4) for the plan year ending June 30, 1993, Employer X determines employees' accrual rates under the accrued-to-date method in paragraph (d)(3) of this section by using the following as the testing compensation divisor in paragraphs (d)(3)(i)(D) and (d)(3)(ii)(E) of this section: The average of each employee's annual compensation for the 5 consecutive 12-month periods (or the employee's period of employment, if shorter) during which the average of the employee's annual compensation is the highest. In determining the 5 consecutive 12-month periods during which the average of each employee's annual compensation is the highest, the last 10 consecutive 12-month periods ending on June 30, 1993, of each employee's compensation history are taken into account or, if shorter, the employee's period of testing service. In determining compensation for each 12-month period in an employee's compensation history, Employer X defines compensation using a definition that satisfies section 414(s). The amount of compensation used to determine employees' accrual rates under Plan A meets the definition of average annual compensation in paragraph (e)(2) of this section and thus is testing compensation within the meaning of paragraph (e)(3)(i) of this section.

Example 2. (a) The facts are the same as in *Example 1*, except that, in determining the amount of each employee's compensation for the 12-month periods in each employee's compensation history ending in 1990 through 1993 that are taken into account in determining each employee's average annual compensation, Employer X defines compensation as wages within the meaning of section 3401(a) (wages for purposes of income tax withholding). In determining the amount of each employee's compensation for the 12-month periods in each employee's compensation history ending June 30, 1988, and June 30, 1989, that are taken into account in determining each employee's average annual compensation, Employer X defines compensation as section 415(c)(3) compensation (as defined in § 1.415–2(d) without regard to § 1.415–2(d) (10) through (12)). In determining the amount of each employee's compensation for the 12-month periods in each employee's compensation history beginning before January 1, 1988, taken into account in determining each employee's average annual compensation, Employer X defines compensation using a definition that does not satisfy section 414(s) but that was nondiscriminatory for the 1984 through 1987 plan years based on the relevant facts for those plan years.

(b) The testing compensation divisor used to determine employees' accrual rates for purposes of paragraph (d)(3) of this section is average annual compensation, and thus may be used as testing compensation, even though the underlying definition used to measure the amount of compensation for each year in an employee's compensation history is not the same. The underlying definition of compensation for each 12-month period in the employee's compensation history is section 414(s) compensation, because the definition satisfies the requirements contained in the definition of section 414(s) compensation in § 1.401(a)(4)–12.

Example 3. The facts are the same as in *Example 2*, except the testing compensation divisor used in determining each employee's rate of accrual is the average of the employee's annual section 414(s) compensation for the consecutive 12-month periods ending on June 30, 1993, during which the employee was employed by Employer X rather than the average of 5 consecutive 12-month periods as described in *Examples 1* and *2*. The compensation used to determine accruals is average annual compensation. The averaging period is determined consistently for each employee even though a different number of years is used to determine each employee's averaging period because the averaging period for each employee includes all the employee's years of consecutive employment. Thus, the amount of compensation used to determine employee's accrual rates under Plan A for purposes of paragraph (d)(3) of this section meets the definition of average annual compensation and may be used as testing compensation.

Example 4. The facts are the same as *Example 2*, except that Employer X determines the accrual rates for employees in Plan A who work at Plant S using, as the testing compensation divisor, each employee's plan year compensation as modified by paragraph (e)(3)(ii) of this section. The accrual rates for all other employees in Plan A are determined, using as the testing compensation divisor, each employee's average annual compensation as described in *Examples 1* and *2*. Employer X is not determining testing compensation for all employees, because the same method is not being used (either average annual compensation or plan year compensation) to determine the testing compensation for each employee in the plan. Therefore, the accrual rates determined for each employee in the plan do not satisfy paragraph (d)(3) of this section. However, Employer X may be able to restructure Plan A into two component plans in accordance with § 1.401(a)(4)–9(c), one component plan including all employees in Plan A who work in Plant S and the other component plan including the employees in Plan A who do not work in Plant S.

Example 5. The facts are the same as in *Example 4*, except that the testing compensation divisor used by Employer X to determine the accrual rates for employees in Plan A who work at Plant S is the average of each employee's compensation for the 3 consecutive 12-month periods during which the average of each employee's annual section 414(s) compensation is the highest, rather than the average for the 5 consecutive 12-month periods that is used for other employees in the plan. Employer X is not using average annual compensation and thus is not using testing compensation to determine each employee's accrual rates because the averaging period is not determined consistently for all employees. Therefore the accrual rates determined for each employee in the plan do not satisfy paragraph (d)(3) of this section.

Example 6. (a) The facts are the same as in *Example 1*, except that Employer X determines each employee's accrual rates using the projected method in paragraph (d)(4) of this section and Employer X determines compensation for each 12-month period in the employee's compensation history on the basis of the calendar year ending in the plan year. Employee Q, born on May 30, 1943, began participation in Plan A on July 1, 1973, and has benefited under the plan in every plan year since that date. Employee Q's testing age is 65. Employee Q has the following compensation history for the calendar years 1983 through 1992: 1983—$10,000; 1984—$12,000; 1985—$14,000; 1986—$15,000; 1987—$17,000; 1988—$17,000; 1989—$15,000; 1990—$15,000; 1991—$13,000; 1992—$12,000.

(b) In order to determine Employee Q's normal accrual rate, Employee Q's projected average annual compensation as of Employee Q's testing age of 65 must be determined. To determine Employee Q's compensation history to be used in determining Employee Q's projected average annual compensation, Employer X must assume that Employee Q's annual section 414(s) compensation for calendar years 1993 through 2007 (the calendar year ending in the plan year in which Employee Q attains the testing age of age 65) will be $12,000 for each calendar year, the same as Employee Q's annual section 414(s) compensation for the 1992 calendar

year ending in the 1993 plan year. However, calendar years 1983 through 1992 must also be included in Employee Q's compensation history that is taken into account in determining Employee Q's projected average annual compensation. Employee Q's highest averaging period is calendar years 1986 through 1990 (the 5 consecutive 12-month periods out of calendar years 1983 through 2007, using projected annual section 414(s) compensation for 1993 through 2007, during which the average of Employee Q's annual section 414(s) compensation is the highest). Therefore Employee Q's projected average annual compensation for the 2007 plan year is $15,800 (($15,000 plus $17,000 plus $17,000 plus $15,000 plus $15,000) divided by 5)).

Example 7. (a) Plan M is a high average pay plan established on July 1, 1998, with a plan year ending each June 30. Plan M bases benefits for each employee on the average of the employee's annual compensation for the 36 months (or, if shorter, the employee's period of employment) during which the average of the employee's annual compensation is the highest. Compensation for purposes of determining benefits under the plan is determined using a definition that satisfies section 414(s). In determining the 36 months for each employee during which the average of the employee's annual compensation is the highest, the plan takes into account the 10 consecutive 12-month periods of the employee's compensation history ending on the June 30 preceding the date on which the employee terminates employment.

(b) The compensation determined under Plan M is not testing compensation, because compensation for the 12-month period ending on the June 30 during which any employee terminates employment is not included in the compensation history of that employee in determining the employee's average annual compensation. Therefore the average annual compensation determined under Plan M may not be used to determine accrual rates for purposes of paragraph (d) of this section. However, if plan M were a safe harbor plan under paragraph (b) of this section, the compensation determined under Plan M would nevertheless be treated as average annual compensation. See paragraph (b)(8)(x)(B) of this section.

(f) *Special rules*—(1) *In general.* The special rules in this paragraph (f) apply for purposes of applying the provisions of this section to a defined benefit plan.

(2) *Section 415 limits.* Plan provisions that implement the limits of section 415 are disregarded. Furthermore, any plan provision that provides for increases in an employee's accrued benefit (that would have been greater but for the application of section 415) due solely to adjustments under section 4125(d)(1) is also disregarded, but only if such provision applies uniformly to all employees in the plan. Thus, for example, a plan does not fail to satisfy the safe harbors in paragraph (b) of this section merely because the plan limits benefits in accordance with section 415. Similarly, for purposes of determining accrual rates under paragraph (d) of this section, plan benefits are determined without regard to plan provisions that implement the limits of section 415.

(3) *Accruals after normal retirement age*—(i) *In general.* An employee's accruals for any plan year after the plan year in which the employee attains normal retirement age are taken into account for purposes of this section. However, any plan provision may be disregarded that provides for increases in an employee's accrued benefit solely because the employee has delayed commencing benefits beyond the normal retirement age applicable to the employee under the plan, but only if—

(A) The plan provision applies on the same terms to all employees in the plan;

(B) The same uniform normal retirement age applies to all employees in the plan; and

(C) The percentage factor used to increase the employee's accrued benefit is no greater than the largest percentage factor that could be applied to actuarially increase the employee's accrued benefit using any standard mortality table and any standard interest rate.

(ii) *Examples.* The following examples illustrate the rules of this paragraph (f)(3). In each example, it is assumed that the plan satisfies the requirements of paragraph (f)(3)(i) (A) through (C) of this section.

Example 1. Plan A provides a benefit of 2 percent of average annual compensation per year of service for all employees. In addition, Plan A provides an actuarial increase in an employee's accrued benefit of 6 percent for each year that an employee defers commencement of benefits beyond normal retirement age. For employees who continue in service beyond normal retirement age, the employee's 2-percent accrual for the current plan year is offset by the 6-percent actuarial increase, as permitted under section 411(b)(1)(H)(iii)(II). The employer may disregard the actuarial increase (and hence the offset) and thus may treat all employees as if they were accruing at the rate of 2 percent of average annual compensation per year.

Example 2. The facts are the same as in *Example 1*, except that the employee's 2-percent accrual for the current plan year is not offset by the 6-percent actuarial increase. The employer may disregard the actuarial increase and thus may treat all employees as if they were accruing at the rate of 2 percent of average annual compensation per year.

(4) *Early retirement window benefits*—(i) *General rule.* In applying the uniform subsidies requirement of paragraph (b)(2)(iv) of this section or in determining an employee's most valuable accrual rate under paragraph (d) of this section, all early retirement benefits, retirement-type subsidies, and QSUPPs for which the employee is (or is projected to be) eligible are taken into account, regardless of whether they are permanent features under the plan or are offered only to employees who retire within a limited period of time.

(ii) *Exceptions.* Notwithstanding paragraph (f)(4)(i) of this section, an early retirement window benefit (as defined in paragraph (f)(4)(iii) of this section) is taken into account in accordance with the following rules—

(A) In the case of an early retirement window benefit that is available for a period that begins in one plan year and ends in the immediately succeeding plan year, the early retirement window benefit is disregarded for purposes of applying this section to the plan for the second plan year. The preceding sentence applies solely in the case of employees to whom the early retirement window benefit was treated as currently available for purposes of applying § 1.401(a)(4)–4(b) to the plan for the first plan year, but who did not elect the window in that plan year.

(B) An early retirement window benefit is disregarded for purposes of applying this section to a plan for any plan year after the last plan year in which the early retirement window benefit is available. Thus, for example, in applying the option of the floor on the most valuable accrual rate in paragraph (d)(6)(v) of this section, the most valuable accrual rate in any plan year other than the current plan year is determined without regard to any early retirement window benefit offered in an earlier plan year. Similarly, in determining the most valuable accrual rate under the fresh-start alternative for the accrued-to-date method in paragraph (d)(6)(vii) of this section, the normalized amount of a QJSA frozen as of the fresh-start date is determined without regard to any early retirement window benefit offered in the plan year that ends on the fresh-start date.

(iii) *Early retirement window benefit defined.* An early retirement window benefit is an early retirement benefit, retirement-type subsidy, or QSUPP payable under a plan only to employees who retire within a limited period of time (not to exceed 1 year). For this purpose, an amendment to an early retirement window benefit that merely extends the early retirement window benefit period is not treated as a separate early retirement window benefit, provided that the period as extended does not exceed 1 year. However, any other amendment to an early retirement window benefit creates a separate early retirement window benefit.

(5) *Unpredictable contingent event benefits*—(i) *General rule.* In applying

the uniform subsidies requirement of paragraph (b)(2)(iv) of this section or in determining an employee's normal or most valuable accrual rate under paragraph (d) of this section, an unpredictable contingent event benefit is not taken into account until the occurrence of the contingent event. Upon the occurrence of the contingent event, the contingent event benefit is taken into account only for those employees who are affected by the contingent event under the terms of the plan. For purposes of this section, an unpredictable contingent event benefit is an unpredictable contingent event benefit as described in section 412(l)(7).

(ii) *Example.* The following example illustrates the rules of this paragraph (f)(5).

Example. (a) Employer X operates various manufacturing plants and maintains Plan A, a defined benefit plan that covers all its nonexcludable employees. Plan A provides an early retirement benefit under which employees who retire after age 55 but before normal retirement age and who have at least 10 years of service receive a benefit equal to their normal retirement benefit reduced by 4 percent per year for each year prior to normal retirement age. Plan A also provides a plant-closing benefit under which employees who satisfy the conditions for receiving the early retirement benefit and who work at a plant where operations have ceased and whose employment has been terminated will receive an unreduced normal retirement benefit. The plant-closing benefit is an unpredictable contingent event benefit within the meaning of section 412(l)(7).

(b) During the 1993 plan year, Employer X had no plant closings. Therefore, the plant-closing benefit is not taken into account for the 1993 plan year in determining accrual rates or in applying the safe harbors in paragraph (b) of this section.

(c) During the 1994 plan year, one of Employer X's plants closes. Employees M through Z, who are employees at the plant that is closing, will satisfy the conditions for the plant-closing benefit. Therefore, in testing Plan A for compliance with this section for the 1994 plan year, the availability of the plant-closing benefit to Employees M through Z must be taken into account in determining their accrual rates or in determining whether the plan satisfies one of the safe harbors under paragraph (b) of this section.

(6) *Determination of benefits on other than plan year basis.* For purposes of this section, accruals are generally determined based on the plan year. Nevertheless, an employer may, but need not, determine accruals on the basis of any period ending within the plan year as long as the period is at least 12 months in duration and is applied uniformly to all employees in the plan for that plan year. For example, accruals for all employees may be determined based on accrual computation periods ending within the plan year.

(7) *Adjustments for certain plan distributions.* An employee's accrued benefit includes the actuarial equivalent of prior distributions from the plan to the employee, provided that the years of service taken into account in determining the prior distributions continue to be taken into account under the plan for purposes of determining the employee's current accrued benefit. For purposes of this paragraph (f)(7), actuarial equivalence must be determined in a uniform manner for all employees in the plan using reasonable actuarial assumptions. A standard interest rate and a standard mortality table are considered reasonable. Thus, for example, if an employee has commenced receipt of benefits in accordance with the minimum distribution requirements of section 401(a)(9), and the plan reduces the employee's accrued benefit to take into account the amount of the distributions, the employee's accrued benefit is restored to the value it would have had if the distributions had not occurred.

(8) *Adjustment for certain QPSA charges.* An employee's accrued benefit includes the cost of a qualified preretirement survivor annuity (QPSA) that reduces the employee's accrued benefit otherwise determined under the plan, as permitted under § 1.401(a)–20, Q&A–21. Thus, an employee's accrued benefit is determined as if the cost of the QPSA had not been charged against the accrued benefit. This paragraph (f)(8) applies only if the QPSA charges apply uniformly to all employees in the plan.

§ 1.401(a)(4)–4 Nondiscriminatory availability of benefits, rights, and features.

(a) *Introduction*—(1) *General rule.* The availability of benefits, rights, and features provided under a plan does not discriminate in favor of highly compensated employees if the plan satisfies the requirements of this section. The benefits, rights, and features subject to this requirement are all optional forms of benefit, ancillary benefits, and other rights and features available to any employee under the plan. In general, each benefit, right, and feature provided under a plan is separately subject to the requirements of this section regardless of whether the particular benefit, right, or feature is actuarially equivalent to any other benefit, right, or feature provided under the plan. Thus, for example, a plan may not condition or otherwise limit the availability of an optional form of benefit provided under the plan in a manner that violates the requirements of this section, even though the optional form of benefit is only one of several actuarially equivalent optional forms of benefit under the plan.

(2) *Overview.* A benefit, right, or feature provided under a plan is made available to employees in the plan in a nondiscriminatory manner only if the benefit, right, or feature separately satisfies the current availability requirement of paragraph (b) of this section and the effective availability requirement of paragraph (c) of this section. Paragraph (d) of this section provides special rules for mergers and acquisitions, employees with accrued benefits who are not currently benefiting under the plan, early retirement window benefits, permissive aggregation of certain benefits, rights, or features, and certain spousal benefits. Paragraph (e) of this section defines optional forms of benefit, ancillary benefits, and other rights and features. See § 1.401(a)(4)–9(b)(3) for special rules regarding how this section is applied where one or more defined contribution plans and one or more defined benefit plans are permissively aggregated and treated as a single plan pursuant to § 1.410(b)–7(d).

(b) *Current availability*—(1) *General rule.* The group of employees in the plan year to whom a benefit, right, or feature is currently available during the plan year must satisfy either the ratio percentage test of § 1.410(b)–2(b)(2) or the nondiscriminatory classification test of § 1.410(b)–4 (without regard to the average benefit percentage test of § 1.410(b)–5). In determining whether the group of employees satisfies the ratio percentage test or the nondiscriminatory classification test, an employee is treated as benefiting only if the benefit, right, or feature is currently available to the employee under the plan.

(2) *Determination of current availability*—(i) *General rule.* Whether a benefit, right, or feature that is subject to specified eligibility conditions is currently available to an employee generally is determined based on the current facts and circumstances with respect to the employee (e.g., current compensation, current accrued benefit, current position, or current net worth). Thus, the fact that an employee may, in the future, satisfy a precondition to receipt of the benefit, right, or feature generally does not cause the benefit, right, or feature to be currently available to the employee.

(ii) *Certain age and service conditions disregarded*—(A) *General rule.* Notwithstanding paragraph (b)(2)(i) of this section, any specified age or service condition with respect to an optional form of benefit or a social security supplement is disregarded in determining whether the optional form

of benefit or the social security supplement is current available to an employee. Thus, for example, an optional form of benefit that is available to all employees in the plan who terminate employment on or after age 55 with at least 10 years of service is treated as currently available to an employee, without regard to the employee's current age or years of service and without regard to whether the employee could potentially meet the age and service conditions prior to attaining the plan's normal retirement age. The exception in this paragraph (b)(2)(ii)(A) does not apply in the case of ancillary benefits (other than social security supplements) or other rights and features.

(B) *Time-limited age or service conditions not disregarded.* Notwithstanding paragraph (b)(2)(ii)(A) of this section, an age or service condition is not disregarded in determining the current availability of an optional form of benefit or social security supplement if the condition must be satisfied within a limited period of time. However, in determining the current availability of an optional form of benefit or a social security supplement subject to such an age or service condition, the age and service of employees may be projected to the last date by which the age condition or service condition must be satisfied in order to be eligible for the optional form of benefit or social security supplement under the plan. Thus, for example, an optional form of benefit that is available only to employees who terminate employment between July 1, 1993, and December 31, 1993, after attainment of age 55 with at least 10 years of service is treated as currently available to an employee only if the employee could satisfy those age and service conditions by December 31, 1993.

(iii) *Certain other conditions disregarded.* Specified conditions on the availability of a benefit, right, or feature requiring termination of employment, death, satisfaction of a specified health condition (or failure to meet such condition), disability, hardship, marital status, default on a plan loan secured by a participant's account balance, execution of a covenant not to compete, application for benefits, election of a benefit form, or absence from service (for which imputed service or imputed compensation is granted in accordance with § 1.401(a)(4)–11(d) or 1.414(s)–1(e), respectively), are disregarded in determining the employees to whom the benefit, right, or feature is currently available.

(iv) *Mandatory cash-outs.* In the case of a plan that provides for mandatory cash-outs of all terminated employees who have a vested accrued benefit with an actuarial present value less than or equal to a specified dollar amount (not to exceed $3,500) as permitted by sections 411(a)(11) and 417(e), any condition on a benefit, right, or feature that requires the employee to have a vested accrued benefit with an actuarial present value in excess of the specified dollar amount is disregarded.

(v) *Certain conditions on plan loans.* In the case of an employee's right to a loan from the plan, the condition that an employee must have an account balance sufficient to be eligible to receive a minimum loan amount specified in the plan (not to exceed $1,000) is disregarded in determining the employees to whom the right is available.

(3) *Optional forms of benefit and other rights and features that are eliminated prospectively*—(i) *Special testing rule.* Notwithstanding paragraph (b)(1) of this section, an optional form of benefit or other right or feature that is permanently eliminated with respect to benefits accrued after the later of the eliminating amendment's adoption or effective date (the "elimination date"), but is retained with respect to benefits accrued as of the elimination date, and that satisfies this paragraph (b) as of the elimination date, is treated as satisfying this paragraph (b) for all subsequent periods. This rule does not apply in the case of ancillary benefits. In addition, this rule does not apply if there are any changes in the terms of the optional form of benefit or other right or feature (including changes in the employees to whom it is available) after the elimination date.

(ii) *Treatment of earnings.* For purposes of this paragraph (b)(3), in the case of a defined contribution plan, benefits accrued as of the elimination date include subsequent earnings, expenses, gains, and losses attributable to the balance in an employee's account as of the elimination date. Notwithstanding the foregoing, in the case of a right to a plan loan that is prospectively eliminated, a plan may treat, on a uniform basis, the benefits accrued as of the elimination date as consisting exclusively of the dollar amount of the balance in the employee's account as of the elimination date.

(iii) *Example.* The following example illustrates this paragraph (b)(3).

Example. Plan A is a defined benefit plan that provides a single sum optional form of benefit that is available to all employees on termination of employment. Plan A is amended January 1, 1993, to eliminate this single sum optional form of benefit with respect to benefits accured after December 31, 1993. As of December 31, 1993, the single sum optional form of benefit is currently available to a group of employees that satisfies the ratio percentage test of § 1.410(b)–2(b)(2). As of January 1, 2001, all nonhighly compensated employees who were entitled to the single sum optional form of benefit have terminated from employment with the employer and have taken a distribution of their benefits. The only remaining employees who have a right to take a portion of their benefits in the form of a single sum optional form of benefit on termination of employment are highly compensated employees. Because the availability of the single sum optional form of benefit satisfied the current availability requirements of this paragraph (b) on December 31, 1993 (i.e., immediately prior to the later of the date on which the amendment was adopted or effective), the optional form of benefit is deemed to continue to satisfy the current availability requirement of this paragraph (b) for subsequent plan years without further testing.

(c) *Effective availability*—(1) *In general.* Based on all the facts and circumstances, the group of employees to whom the benefit, right, or feature is effectively available must not substantially favor highly compensated employees. This requirement must be met even if the benefit, right, or feature is, or has been, currently available to a group of employees that satisfies the current availability requirement of paragraph (b) of this section.

(2) *Examples.* The following examples illustrate the provisions of this paragraph (c).

Example 1. Employer X maintains Plan A, a defined benefit plan that covers both of its highly compensated nonexcludable employees and 9 of its 12 nonhighly compensated nonexcludable employees. Plan A provides for a normal retirement benefit payable as an annuity and based on a normal retirement age of 65, and an early retirement benefit payable upon termination in the form of an annuity to employees who terminate from service with the employer on or after age 55 with 30 or more years of service. Both highly compensated employees of Employer X currently meet the age and service requirement, or will have 30 years of service by the time they reach age 55. All but 2 of the 9 nonhighly compensated employees of Employer X who are covered by Plan A were hired on or after age 35 and, thus, cannot qualify for the early retirement benefit. Even though the group of employees to whom the early retirement benefit is currently available satisfies the ratio percentage test of § 1.410(b)–2(b)(2) when age and service are disregarded pursuant to paragraph (b)(2)(ii)(A) of this section, under these facts, the group of employees to whom the early retirement benefit is effectively available substantially favors highly compensated employees.

Example 2. Employer Y maintains Plan B, a defined benefit plan that provides for a normal retirement benefit payable as an annuity and based on a normal retirement age of 65. By a plan amendment first adopted and effective December 1, 1993, Employer Y amends Plan B to provide an early retirement benefit that is available only to employees who terminate employment by December 15, 1993, and who are at least age 55 with 30 or more years of service. Assume that all employees were hired prior to attaining age 25, and that the group of employees who have, or will have attained age 55 with 30 years of service by December 15 1993, satisfies the ratio percentage test of § 1.410(b)–2(b)(2). Assume, further, that the employer takes no steps to inform all eligible employees of the early retirement option on a timely basis, and that the only employees who terminate from employment with the employer during the 2-week period in which the early retirement benefit is available are highly compensated employees. Under these facts, the group of employees to whom this early retirement window benefit is effectively available substantially favors highly compensated employees.

Example 3. Employer Z amends Plan C on June 30, 1992, to provide for a single sum optional form of benefit for employees who terminate from employment with Employer Z after June 30, 1992, and before January 1, 1993. The availability of this single sum optional form of benefit is conditioned on the employee's having a particular disability at the time of termination of employment. The only employee of the employer who meets this disability requirement at the time of the amendment and thereafter through December 31, 1992, is a highly compensated employee. Under paragraph (b)(2)(iii) of this section, the disability condition is disregarded in determining the current availability of the single sum optional form of benefit. Nevertheless, under these facts, the group of employees to whom the single sum optional form of benefit is effectively available substantially favors highly compensated employees.

(d) *Special rules*—(1) *Mergers and acquisitions*—(i) *Special testing rule.* In the case of a transaction described in paragraph (d)(1)(ii)(A) of this section, an optional form of benefit or other right or feature available under a plan of an employer is treated as satisfying the requirements of this section for the plan year of the transaction and all subsequent plan years if all the following requirements are satisfied—

(A) The optional form of benefit or other right or feature satisfied the requirements of paragraphs (b) and (c) of this section immediately before the transaction (without taking into account section 410(b)(6)(C)). This determination is made with reference to the plan of the prior employer and its nonexcludable employees.

(B) The optional form of benefit or other right or feature satisfies the requirements of paragraphs (b) and (c) of this section immediately after the transaction (without taking into account section 410(b)(6)(C) or this paragraph (d)(1)). This determination is made with reference to the plan of the current employer and its nonexcludable employees.

(C) The optional form of benefit or other right or feature is available under the plan of the current employer after the transaction on the same terms as it was available under the plan of the prior employer before the transaction. Thus, for example, the optional form of benefit or other right or feature must continue to be available to the acquired employees to whom the optional form of benefits or other right or feature was available before the transaction, and may not be made available to any additional employees after the transaction to whom the optional form of benefit or other right or feature was not available before the transaction.

(ii) *Scope of special testing rule.* This paragraph (d)(1) applies only—

(A) In the case of a transaction between the current employer and the prior employer that is a stock or asset acquisition, a merger, or other similar transaction involving a change in the employer of the employees of a trade or business.

(B) For the period that the requirements in paragraph (d)(1)(i) of this section are satisfied.

(C) To optional forms of benefit and other rights and features, but not to ancillary benefits.

(D) To optional forms of benefit and other rights and features with respect to benefits accrued under the plan of the current employer, and not to optional forms of benefit and other rights and features with respect to benefits accrued under the plan of the prior employer (unless, pursuant to the transaction, the plan of the prior employer becomes the plan of the current employer, or the assets and liabilities with respect to the acquired employees under the plan of the prior employer are transferred to the plan of the current employer in a plan merger, consolidation, or other transfer described in section 414(l)).

(iii) *Option to extend availability to new employees.* Notwithstanding paragraph (d)(1)(i)(C) of this section, the optional form of benefit or other right or feature may be extended to additional employees who are either hired by or transferred into the acquired trade or business during the transition period defined in section 410(b)(6)(C)(ii). The option in this paragraph (d)(1)(iii) applies only if the optional form of benefit or other right or feature satisfies the requirements of paragraphs (b) and (c) of this section immediately after the transition period (without taking into account this paragraph (d)(1)), in addition to the requirements in paragraph (d)(1)(i) of this section.

(iv) *Example.* The following example illustrates this paragraph (d)(1).

Example. Employer X maintains Plan A, a defined benefit plan with a single sum optional form of benefit for all employees in the plan. Employer Y acquires Employer X and merges Plan A into Plan B, a defined benefit plan maintained by Employer Y that does not otherwise provide a single sum optional form of benefit. Employer Y continues to provide the single sum optional form of benefit under Plan B on the same terms as it was offered under Plan A to all employees who were acquired in the transaction with Employer X (and to no other employees). The single sum optional form of benefit satisfied paragraphs (b) and (c) of this section immediately prior to the transaction (without regard to section 410(b)(6)(C)), when tested with reference to Plan A and Employer X's nonexcludable employees. The optional form of benefit satisfies paragraphs (b) and (c) of this section immediately following the transaction (determined without taking into account section 410(b)(6)(C) or this paragraph (d)(1)), when tested with reference to Plan B and Employer Y's nonexcludable employees. Under these facts, Plan B is treated as satisfying the requirements of this section with respect to the single sum optional form of benefit for the plan year of the transaction and all subsequent plan years.

(2) *Frozen participants.* A plan must satisfy the nondiscriminatory availability requirement of this section, not only with respect to benefits, rights, and features provided to employees who are currently benefiting under the plan, but also separately with respect to benefits, rights, and features provided to nonexcludable employees with accrued benefits who are not currently benefiting under the plan ("frozen participants"). Thus, each benefit, right, and feature available to any frozen participant under the plan is separately subject to the requirements of this section. A plan satisfies this section with respect to a benefit, right, or feature available to any frozen participant under the plan only if one or more of the following requirements is satisfied—

(i) The benefit, right, or feature would satisfy the requirements of paragraphs (b) and (c) of this section if the benefit, right, or feature were not available to any employee currently benefiting under the plan;

(ii) The benefit, right, or feature would satisfy the requirements of paragraphs (b) and (c) of this section if all frozen participants were treated as employees currently benefiting under the plan;

(iii) No change in the availability of the benefit, right, or feature has been made that is first effective in the current

plan year with respect to a frozen participant; or

(iv) Any change in the availability of the benefit, right, or feature that is first effective in the current plan year with respect to a frozen participant is made in a nondiscriminatory manner. Thus, any expansion in the availability of the benefit, right, or feature to any highly compensated frozen participant must be applied on a consistent basis to all nonhighly compensated frozen participants. Similarly, any contraction in the availability of the benefit, right, or feature that affects any nonhighly compensated frozen participant must be applied on a consistent basis to all highly compensated frozen participants.

(3) *Early retirement window benefits.* An early retirement benefit that is only available to employees who terminate employment within a specified time period is an optional form of benefit that must separately satisfy the requirements of this section. See paragraph (e)(1) of this section for the definition of optional form of benefit. Nonetheless, if the early retirement benefit meets the definition of an early retirement window benefit in § 1.401(a)(4)–3(f)(4)(iii), and if the early retirement window benefit is available for a specified period that begins in one plan year and ends in the immediately succeeding plan year, the early retirement window benefit is disregarded for purposes of applying this section to the plan for the second plan year. The preceding sentence applies solely in the case of employees to whom the early retirement window benefit was treated as currently available for purposes of applying this section to the plan for the first plan year, but who did not elect the window in that plan year.

(4) *Permissive aggregation of certain benefits, rights, or features*—(i) *General rule.* In general, each optional form of benefit, ancillary benefit, and other right or feature must separately satisfy the requirements of this section. However, an optional form of benefit, ancillary benefit, or other right or feature may be aggregated with another optional form of benefit, ancillary benefit, or other right or feature, respectively, and the two may be treated as a single optional form of benefit, ancillary benefit, or other right or feature, if both of the following requirements are satisfied—

(A) One of the two optional forms of benefit, ancillary benefits, or other rights or

(A) One of the two optional forms of benefit, ancillary benefits, or other rights or features is in all cases of inherently equal or greater value than the other. For this purpose, one benefit, right, or feature is of inherently equal or greater value than another benefit, right, or feature only if, at any time and under any conditions, it is impossible for any employee to receive a smaller amount under the first benefit, right, or feature than under the second benefit, right, or feature.

(B) The optional form of benefit, ancillary benefit, or other right or feature of inherently equal or greater value separately satisfies the requirements of this section (without regard to this paragraph (d)(4)).

(ii) *Aggregation may be applied more than once.* The aggregation rule in this paragraph (d)(4) may be applied more than once. Thus, for example, an optional form of benefit may be aggregated with another optional form of benefit that itself constitutes two separate optional forms of benefit that are aggregated and treated as a single optional form of benefit under this paragraph (d)(4).

(iii) *Examples.* The following examples illustrate the permissive aggregation rule in this paragraph (d)(4).

Example 1. Plan A is a defined benefit plan that provides a single sum optional form of benefit to all employees in the plan. The single sum optional form of benefit is available on the same terms to all employees in the plan, except that for employees in Division A, a 5-percent discount factor is applied, and for employees of Division B, a 7-percent discount factor is applied. Under paragraph (e)(1) of this section, the single sum optional form of benefit constitutes two separate optional forms of benefit. Assume that the single sum optional form of benefit available to employees of Division A separately satisfies the requirements of this section without taking into account this paragraph (d)(4). Because a lower discount factor is applied in determining the single sum optional form of benefit available to employees of Division A than is applied in determining the single sum optional form of benefit available to employees of Division B, the first single sum optional form of benefit is inherently more valuable than the second single sum optional form of benefit. Under these facts, these two single sum optional forms of benefit may be aggregated and treated as a single optional form of benefit for purposes of this section.

Example 2. The facts are the same as in *Example 1,* except that in order to receive the single sum optional form of benefit, employees of Division A (but not employees of Division B) must have completed at least 20 years of service. The single sum optional form of benefit available to employees of Division A is not of inherently equal or greater value than the single sum optional form of benefit available to employees of Division B, because an employee of Division A who terminates employment with less than 20 years of service would receive a smaller amount (i.e., zero) than a similarly situated employee of Division B who terminates employment with less than 20 years of service. Under these facts, the two single sum optional forms of benefit may not be aggregated and treated as a single optional form of benefit for purposes of this section.

(5) *Certain spousal benefits.* In the case of a plan that includes two or more plans that have been permissively aggregated under § 1.410(b)–7(d), the aggregated plan satisfies the requirements of this section with respect to the availability of any nonsubsidized qualified joint and survivor annuities, qualified preretirement survivor annuities, or spousal death benefits described in section 401(a)(11), if each plan that is part of the aggregated plan satisfies section 401(a)(11). If any subsidized qualified joint and survivor annuities, qualified preretirement survivor annuities, or spousal death benefits described in section 401(a)(11) are provided, the availability of these subsidized benefits under the aggregated plan must satisfy either the requirements of this section or the special rule of § 1.401(a)(4)–9(b)(3)(i) (regarding non-core benefits, rights, and features under a DB/DC plan), whichever is applicable. Whether a benefit is considered subsidized for this purpose may be determined using the interest rate, mortality, and other actuarial assumptions specified in the plan, provided those assumptions are reasonable. Whether those assumptions are reasonable is determined taking into account any other assumptions used under the plan. In addition, for purposes of this paragraph (d)(5), a qualified joint and survivor annuity, qualified preretirement survivor annuity, or spousal death benefit is deemed to be nonsubsidized if it is provided under a defined contribution plan.

(e) *Definitions*—(1) *Optional form of benefit*—(i) *General rule.* For purposes of this section, the term "optional form of benefit" means a distribution alternative (including the normal form of benefit) that is available under a plan with respect to benefits described in section 411(d)(6)(A) or early retirement benefits and retirement-type subsidies described in section 411(d)(6)(B)(i), including QSUPPs. Except as provided in paragraph (e)(1)(ii) of this section, different optional forms of benefit exist if the distribution alternative is not payable on substantially the same terms. The relevant terms include all terms affecting the value of the optional form, such as the method of benefit calculation and the actuarial assumptions used to determine the amount distributed. Different optional forms of benefit may result from differences in payment schedule, timing, commencement, medium of distribution (e.g., in cash or in kind), election rights,

or the portion of the benefit to which the distribution alternative applies.

(ii) *Exceptions*—(A) *Differences in benefit formula or accrual method.* An optional form of benefit available under a defined benefit plan does not fail to be a single optional form of benefit merely because the benefit formula or accrual method (or both) underlying the optional form of benefit are different for different employees to whom the optional form of benefit is available. Notwithstanding the foregoing, differences in the normal retirement ages of employees or in the form in which the accrued benefit of employees is payable at normal retirement age under a plan are taken into account in determining whether an optional form of benefit constitutes one or more optional forms of benefit.

(B) *Differences in allocation formula.* An optional form of benefit available under a defined contribution plan does not fail to be a single optional form of benefit merely because the method of determining allocations (including allocations of earnings, expenses, gains, and losses described in § 1.401(a)(4)–2(c)(2)(iii)) to account balances are different for different employees to whom the optional form of benefit is available.

(C) *Distributions subject to section 417(e).* An optional form of benefit available under a defined benefit plan does not fail to be a single optional form of benefit merely because, in determining the amount of a distribution, the plan applies a lower interest rate to determine the distribution for employees with a vested accrued benefit having an actuarial present value not in excess of $25,000, as required by section 417(e) and § 1.417(e)–1.

(iii) *Examples.* The following examples illustrate the definition of optional form of benefit in this paragraph (e)(1).

Example 1. Plan A is a defined benefit plan that benefits all employees of Divisions M and N. The plan offers a qualified joint and 50-percent survivor annuity at normal retirement age, calculated by multiplying an employee's single life annuity payment by a factor. For an employee of Division M whose benefit commences at age 65, the plan provides a factor of 0.90, but for a similarly situated employee of Division N the plan provides a factor of 0.85. The qualified joint and survivor annuity is not available to employees of Division M and N on substantially the same terms.

Example 2. Plan B is a defined benefit plan that benefits all employees of Divisions R and S. The plan offers a single sum optional form of benefit which, for employees of Division R, is determined using a fixed interest rate assumption and, for employees of Division S, is determined using a different fixed interest rate assumption. The single sum optional form of benefit is not available to employees of Divisions R and S on substantially the same terms.

Example 3. Plan C is a defined benefit plan that benefits all employees of Divisions T and U. The plan offers a single sum optional form of benefit, available on the same terms and determined using the same actuarial assumptions, to all employees. However, different benefit formulas are provided to each division. Despite that fact, under the exception provided in paragraph (e)(1)(ii)(A) of this section, the single sum optional form of benefit available to employees of Division T is not a separate optional form of benefit from the single sum optional form available to employees of Division U.

(2) *Ancillary benefit.* For purposes of this section, the term "ancillary benefit" includes social security supplements (other than QSUPPs), disability benefits not in excess of a qualified disability benefit described in section 411(a)(9), ancillary life insurance and health insurance benefits, death benefits under a defined contribution plan, preretirement death benefits under a defined benefit plan, shut-down benefits not protected under section 411(d)(6), and other similar benefits. Different ancillary benefits exist with respect to each benefit that is not available on substantially the same terms.

(3) *Other right or feature.* For purposes of this section, the term "other right or feature" means any right or feature applicable to employees under the plan, other than a right or feature taken into account under paragraph (e)(1) or (e)(2) of this section as part of an optional form of benefit or an ancillary benefit under plan, and other than a right or feature that cannot reasonably be expected to be of more than insignificant value to an employee (e.g., administrative details). Different rights or features exist if the right or feature is not available on substantially the same terms. Other rights and features include, but are not limited to, the following—

(i) Plan loan provisions (other than those relating to distribution of an employee's accrued benefit upon default under a loan);

(ii) The right to direct investments;

(iii) The right to a particular form of investment;

(iv) The right to a particular class or type of employer securities (taking into account any difference in conversion, dividend, voting, liquidation preference, or other rights conferred under the security);

(v) The right to make each rate of elective contributions described in § 1.401(k)–1(g)(3) (taking into account the definition of compensation under the plan out of which elective contributions are made);

(vi) The right to make after-tax employee contributions to a defined benefit plan that are not allocated to separate accounts;

(vii) The right to make each rate of employee contributions described in § 1.401(m)–1(f)(6) (taking into account the definition of compensation under the plan out of which employee contributions are made);

(viii) The right to an allocation of each rate of matching contributions described in § 1.401(m)–(f)(12) and the formulas and requirements of matching contributions (taking into account, if applicable, the definition of compensation under the plan by reference to which matching contributions are made, and any corrective distributions of excess deferrals, excess contributions, or excess aggregate contributions);

(ix) The right to purchase additional retirement or ancillary benefits under the plan; and

(x) The right to make rollover contributions and transfers to and from the plan.

§ 1.401(a)(4)–5 Plan amendments and plan terminations.

(a) *Plan amendments*—(1) *General rule.* A plan does not satisfy section 401(a)(4) if a plan amendment or series of plan amendments discriminates significantly in favor of highly compensated employees. For this purpose, a plan amendment includes the establishment or termination of a plan and any change in the benefits, rights, or features under a plan.

(2) *Facts-and-circumstances determination.* Whether a plan amendment or series of plan amendments discriminates significantly in favor of highly compensated employees is determined based on all relevant facts and circumstances. These include, for example, the relative numbers of highly and nonhighly compensated employees affected by the plan amendment, the relative accrued benefits of highly and nonhighly compensated employees before and after the plan amendment, any additional benefits provided to highly and nonhighly compensated employees under other plans, the relative length of service of highly and nonhighly compensated employees, the length of time the plan and the benefit, right, or feature being amended have been in effect, and the turnover of employees prior to the plan amendment. In the case of a plan amendment that grants past service credits, the relevant facts and

circumstances also include the benefits former employees would have received had the plan, as amended, been in effect throughout the period for which past service credits are granted. For this purpose, past service credits include benefits attributable to an employee's service prior to the time a new plan is in effect, increases in existing benefits resulting from an employee's service prior to the effective date of a plan amendment, and benefits attributable to an employee's service with another employer.

(3) *Time at which determination is made.* The requirements of this paragraph (a) are generally applied at the time a plan amendment first becomes effective for purposes of section 401(a). Thus, whether a plan amendment with a delayed effective date discriminates significantly in favor of highly compensated employees is generally determined when the amendment actually becomes effective, and not when it is adopted. In the case of an unpredictable contingent event benefit (within the meaning of section 412(l)(7)), the determination as to whether the amendment discriminates significantly in favor of highly compensated employees is generally made at the time the contingency occurs.

(4) *Treatment of certain prospective plan amendments.* A plan amendment increasing future benefits for highly compensated employees or reducing future benefits for nonhighly compensated employees does not necessarily discriminate significantly in favor of highly compensated employees. For example, an amendment instituting use of the disparity permitted under section 401(l) for the first time does not necessarily discriminate significantly in favor of highly compensated employees.

(5) *Safe harbor for certain grants of past service.* A plan amendment that credits past service is deemed not to discriminate significantly in favor of highly compensated employees if the period for which the credit is granted does not exceed the 5 years immediately preceding the year in which the amendment first becomes effective, the past service credit is granted on a reasonably uniform basis to current employees under the plan, the amount of the credit is determined by applying the current plan formula to the number of years being credited, and the period for which past service credit is granted represents actual service (or imputed service within the meaning of § 1.401(a)(4)–11(d)) with the employer or a previous employer. However, this safe harbor is not available if a plan amendment granting past service credit for 5 years is part of a pattern of amendments that significantly discriminates in favor of highly compensated employees.

(6) *Examples.* The following examples illustrate the plan amendment rules in this paragraph (a).

Example 1. Plan A is a defined benefit plan that covered both highly and nonhighly compensated employees for most of its existence. The employer decides to wind up its business. In the process of ceasing operations, but at a time when the plan covers only highly compensated employees, Plan A is amended to increase benefits and thereafter is terminated. Plan A does not satisfy this paragraph (a).

Example 2. Plan B is a defined benefit plan that provides a social security supplement that is not a QSUPP. After substantially all of the highly compensated employees of the employer have benefited from the supplement, but before a substantial number of nonhighly compensated employees have become eligible for the supplement, Plan B is amended to significantly reduce the amount of the supplement. Plan B does not satisfy this paragraph (a).

Example 3. Plan C is a defined benefit plan that contains an ancillary life insurance benefit available to all employees. The plan is amended to eliminate this benefit at a time when life insurance payments have been made only to beneficiaries of highly compensated employees. Because all employees received the benefit of life insurance coverage before Plan C was amended, Plan C does not fail to satisfy this paragraph (a) merely as a result of the amendment.

Example 4. Plan D provides for a benefit of 1 percent of average annual compensation per year of service. Ten years after Plan D is adopted, it is amended to provide a benefit of 2 percent of average annual compensation per year of service, including years of service prior to the amendment. The amendment is effective only for employees currently employed at the time of the amendment. The ration of highly compensated employees to highly compensated former employees is significantly higher than the ratio of nonhighly compensated employees to nonhighly compensated former employees. Plan D does not satisfy this paragraph (a).

Example 5. The facts are the same as in *Example 4*, except that the years of prior service are equivalent between highly and nonhighly compensated employees who are current employees, and the group of current employees with prior service would satisfy the nondiscriminatory classification test of § 1.410(b)–4 in the current and all prior plan years for which past service credit is granted. Plan D does not fail to satisfy this paragraph (a) merely as a result of the amendment.

Example 6. Employer V maintains Plan E, an accumulation plan. In 1993, Employer V amends Plan E to provide that the compensation used to determine an employee's benefit for all preceding plan years shall not be less than the employee's average annual compensation as of the close of the 1993 plan year. The years of service and percentage increases in compensation for highly compensated employees are reasonably comparable to those of nonhighly compensated employees. In addition, the ratio of highly compensated employees to highly compensated former employees is proportional to the ratio of nonhighly compensated employees to nonhighly compensated former employees. Plan E does not fail to satisfy this paragraph (a) merely as a result of the amendment.

Example 7. Employer W currently has six nonexcludable employees, two of whom, H1 and H2, are highly compensated employees, and the remaining four of whom, N1 through N4, are nonhighly compensated employees. The ratio of highly compensated employees to highly compensated former employees is significantly higher then the ratio of nonhighly compensated employees to nonhighly compensated former employees. Employer W establishes Plan F, a defined benefit plan providing a benefit of 1 percent of average annual compensation per year of service, including years of service prior to the establishment of the plan. H1 and H2 each have 15 years of prior service, N1 has 9 years of past service, N2 has 5 years, N3 has 3 years, and N4 has 1 year. Plan E does not satisfy this paragraph (a).

Example 8. Assume the same facts as in *Example 7*, except that N1 through N4 were hired in the current year, and Employer W never employed any nonhighly compensated employees prior to the current year. Thus, no nonhighly compensated employees would have received additional benefits had Plan F been in existence during the preceding 15 years. Plan F does not fail to satisfy this paragraph (a) merely as a result of the grant of past service.

Example 9. The facts are the same as in *Example 7*, except that the Plan F limits the grant of past service credit to 5 years, and the grant of past service otherwise satisfies the safe harbor in paragraph (a)(5) of this section. Plan F does not fail to satisfy this paragraph (a) merely as a result of the grant of past service.

Example 10. The facts are the same as in *Example 9*, except that 5 years after the establishment of Plan F, Employer W amends the plan to provide a benefit equal to 2 percent of average annual compensation per year of service, taking into account all years of service since the establishment of the plan. The ratio of highly compensated employees to highly compensated former employees who terminated employment during the 5-year period since the establishment of the plan is significantly higher than the ratio of nonhighly compensated employees to nonhighly compensated former employees who terminated employment during the 5-year period since the establishment of the plan. Although the amendment described in this example might separately satisfy the safe harbor in paragraph (a)(5) of this section, the safe harbor is not available with respect to the amendment because, under these facts, the amendment is part of a pattern of amendments that significantly discriminates in favor of highly compensated employees.

Example 11. Employer Y established Plan G, a defined benefit plan, covering all its employees in 1971. No past service credit was

granted to Employer Y's employees at the time Plan G was established. In 1990, Employer Y acquires Division B from Employer Z. Employees of Division B had been covered under a defined benefit plan maintained by Employer Z. Employer Y amends Plan G to cover all employees of Division B and grants past service credit to all employees of Division B for each year of service with Employer Z beginning with 1971. Employer Y further amends its plan to provide that benefits for employees of Division B under its plan will be offset by benefits paid under the plan maintained by Employer Z. Under these facts, Plan G does not fail to satisfy this paragraph (a) merely as a result of these amendments.

Example 12. Plan H is an insurance contract plan within the meaning of section 412(i). For all plan years before 1999, Plan H purchases insurance contracts from Insurance Company J. In 1999, Plan H shifts future purchases of insurance contracts to Insurance Company K. The shift in insurance companies is a plan amendment subject to the requirements of this paragraph (a).

(b) *Pre-termination restrictions*—(1) *Required provisions in defined benefit plans.* A defined benefit plan must incorporate provisions restricting benefits and distributions as described in paragraphs (b)(2) and (b)(3) of this section at the time the plan is established or, if later, the effective date of these regulations, unless the Commissioner determines that such. provisions are not necessary to prevent the prohibited discrimination that may occur in the event of an early termination of the plan. For this purpose, the restrictions apply to a plan within the meaning of section 414(l). Any plan containing a provision described in this paragraph (b) satisfies section 411(d)(2) and does not fail to satisfy section 411(a) or (d)(3) merely because of the provision.

(2) *Restriction of benefits.* A plan must provide that, in the event of plan termination, the benefit of any highly compensated employee (and any highly compensated former employee) is limited to a benefit that is nondiscriminatory under section 401(a)(4).

(3) *Restrictions on distribution*—(i) *Limit on annual payments.* A plan must provide that the annual payments to an employee described in paragraph (b)(3)(ii) of this section are restricted to an amount equal in each year to the payments that would be made on behalf of the employee under—

(A) A straight life annuity that is the actuarial equivalent of the accrued benefit and other benefits to which the employee is entitled under the plan (other than a social security supplement), and

(B) The amount of the payments that the employee is entitled to receive under a social security supplement. The restrictions in this paragraph (b)(3) do not apply, however, if any one of the following requirements is satisfied—

(*1*) After payment to an employee described in paragraph (b)(3)(ii) of this section of all benefits payable to the employee under the plan, the value of plan assets equals or exceeds 110 percent of the value of current liabilities, as defined in section 412(*l*)(7),

(*2*) The value of the benefits payable to the employee under the plan for an employee described in paragraph (b)(3)(ii) of this section is less than 1 percent of the value of current liabilities before distribution, or

(*3*) The value of the benefits payable to the employee under the plan for an employee described in paragraph (b)(3)(ii) of this section does not exceed the amount described in section 411(a)(11)(A) (restrictions on certain mandatory distributions).

(ii) *Employees whose benefits are restricted.* The employees whose benefits are restricted on distribution include all highly compensated employees and highly compensated former employees. In any one year, the total number of employees whose benefits are subject to restriction under this section can be limited by the plan to a group of not less than 25 highly compensated employees and highly compensated former employees. If the group of affected employees is so limited by the plan, the group must consist of those highly compensated employees and highly compensated former employees with the greatest compensation in the current or any prior year. Plan provisions defining or altering the group of employees whose benefits are restricted under this paragraph (b) may be amended at any time without violating section 411(d)(6).

(iii) *"Benefit" defined.* For purposes of this paragraph (b), the term "benefit" includes, among other benefits, loans in excess of the amounts set forth in section 72(p)(2)(A), any periodic income, any withdrawal values payable to a living employee, and any death benefits not provided for by insurance on the employee's life.

(iv) *Determination of current liabilities.* For purposes of this paragraph (b), an employer required to file Form 5500 (Annual Return/Report of Employee Benefit Plan (with more than 100 participants)) or Form 5500–C/R (Annual Return/Report of Employee Benefit Plan (with less than 100 participants)) may use the value of current liabilities as reported on Schedule B of the employer's most recent, timely filed Form 5500 or Form 5500 C/R. Alternatively, an employer is permitted to determine current liabilities as of a later date. Employers that are not required to file Schedule B of the Form 5500 or Form 5500 C/R may apply rules similar to those applicable to employers who do file Schedule B to determine the value of current liabilities.

(v) *Determination date for assets and liabilities.* For purposes of this paragraph (b), the value of plan assets and the value of current liabilities must be determined as of the same date.

(4) *Operational restrictions on certain money purchase pension plans.* A money purchase pension plan that has an accumulated funding deficiency, within the meaning of section 412(a), must comply in operation with the restrictions on benefits and distributions as described in paragraphs (b)(2) and (b)(3) of this section. Restrictions imposed by the requirements of this paragraph (b)(4) are treated as not violating section 411(d)(6).

§ 1.401(a)(4)–6 Contributory defined benefit plans.

(a) *Overview*—(1) *Contributions not allocated to separate accounts.* This section contains rules necessary for determining whether a contributory DB plan satisfies the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2). A contributory DB plan must satisfy that requirement separately with respect to benefits derived from employer contributions (employer-provided benefits) and benefits derived from employee contributions not allocated to separate accounts (employee-provided benefits). See § 1.401(a)(4)–1(c)(4). The general rules for determining whether a defined benefit plan satisfies the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2) with respect to the amount of employer-provided benefits are set forth in §§ 1.401(a)(4)–3 and 1.401(a)(4)–8 (c) and (d). Paragraph (b) of this section provides rules for determining the amount of employer-provided benefits under a contributory DB plan for purposes of section 401(a)(4). Paragraph (c) of this section provides the exclusive rules for determining whether a contributory DB plan satisfies § 1.401(a)(4)–1(b)(2) with respect to the amount of employee-provided benefits.

(2) *Contributions allocated to separate accounts.* The portion of a plan that consists of employee contributions allocated to separate accounts is treated as a separate plan under the mandatory disaggregation rules of § 1.410(b)–7(c)(1). See § 1.401(a)(4)–2(d)(2) for the exclusive rules for determining whether a plan consisting of contributions of this

type satisfies the nondiscriminatory amount requirement of § 1.401(a)(4)-1(b)(2).

(b) *Determination of employer-provided benefit*—(1) *General rule.* An employee's employer-provided benefit under a contributory DB plan as of a plan year for purposes of section 401(a)(4) equals the difference between the employee's total benefit under the plan as of the plan year and the employee's employee-provided benefit under the plan as of the plan year. The rules of section 411(c) generally must be used to determine an employee's employer-provided benefit for this purpose. However, paragraphs (b)(2) through (b)(6) of this section provide alternative methods for determining an employee's employer-provided benefit. If one of these alternatives is applied with respect to an employee in the plan for a plan year, it must be applied to all employees in the plan for the plan year. Contributory DB plans that satisfy paragraph (b)(2) or (b)(3) of this section may be eligible to use the safe harbor described in § 1.401(a)(4)-3(b)(3) (safe harbor for unit credit plans). Contributory DB plans that satisfy paragraph (b)(4), (b)(5) or (b)(6) of this section may be eligible to use any of the safe harbors in § 1.401(a)(4)-3 (b)(3) through (b)(7) (the safe harbors for unit credit plans, unit credit plans using fractional accrual rule, and flat benefit plans, the alternative safe harbor for flat benefit plans, and the safe harbor for insurance contract plans, respectively). See § 1.401(a)(4)-3(b)(6)(ix).

(2) *Composition-of-workforce method*—(i) *In general.* A contributory DB plan that satisfies paragraphs (b)(2)(ii) (A) and (B) of this section may apply the requirements of § 1.401(a)(4)-3 to the plan by substituting employees' employer-provided benefit rates determined under paragraph (b)(2)(iii) of this section for the accrual rates otherwise applicable under that section.

(ii) *Eligibility requirements*—(A) *Uniform rate of employee contributions.* A contributory DB plan satisfies this paragraph (b)(2)(ii)(A) if it requires all employees in the plan to make employee contributions at the same rate (expressed as a percentage of plan year compensation). A plan does not fail to satisfy this paragraph (b)(2)(ii)(A) merely because it eliminates the requirement of employee contributions for all employees with plan year compensation below a stated dollar amount. Alternatively, a plan does not fail to satisfy this paragraph (b)(2)(ii)(A) merely because it requires all employees in the plan to make employee contributions at the same rate (expressed as a percentage of plan year compensation) with respect to plan year compensation up to a stated dollar amount, and at a higher rate (expressed as a percentage of plan year compensation) that is the same for all employees in the plan with respect to plan year compensation at or above the stated dollar amount.

(B) *Demographic requirements*—(*1*) *In general.* A contributory DB plan satisfies this paragraph (b)(2)(ii)(B) if it satisfies one of the demographic tests in paragraph (b)(2)(ii)(B) (*2*) or (*3*) of this section.

(*2*) *Minimum percentage test.* This test is satisfied only if more than 40 percent of the nonhighly compensated employees in the plan have attained ages at least equal to the plan's target age, and more than 20 percent (rounded up to the next whole number) of the nonhighly compensated employees in the plan have attained ages at least equal to the average attained age of the highly compensated employees in the plan. For this purpose, a plan's target age is the lesser of age 50, or the average attained age of the highly compensated employees in the plan minus X years, where X equals 20 minus the number that is equal to 5 times the employee contribution rate under the plan (expressed as a percentage of plan year compensation). In no case, however, may X years be fewer than zero (0) years. Thus, for example, if the average attained age of the highly compensated employees in the plan is 53 and the employee contribution rate is 2 percent of plan year compensation, the plan's target age is 43 years (i.e., 53 minus (20 minus (5 times 2))).

(*3*) *Ratio test.* This test is satisfied only if the percentage of all nonhighly compensated nonexcludable employees, who are in the plan and who have attained ages at least equal to the average attained age of the highly compensated employees in the plan, is at least 70 percent of the percentage of all highly compensated nonexcludable employees, who are in the plan and who have attained ages at least equal to the average attained age of the highly compensated employees in the plan. Attained age must be determined as of the beginning of the plan year. In lieu of determining the actual distribution of the attained ages of the highly compensated employees, an employer may assume that 50 percent of all highly compensated employees in the plan have attained ages at least equal to the average attained age of the highly compensated employees in the plan.

(iii) *Determination of employer-provided benefit*—(A) *Application of factors to determine employee-provided benefit rate.* The rate at which employee-provided benefits are provided under a contributory DB plan (the employee-provided benefit rate) may be determined for purposes of this paragraph (b)(2) by multiplying the rate at which employee contributions (expressed as a percentage of plan year compensation) are required to be made under the plan by the factor determined under paragraph (b)(2)(iv) of this section. In the case of a contributory DB plan described in the second or third sentences of paragraph (b)(2)(ii)(A) of this section (e.g., a plan requiring different rates of employee contributions at different levels of plan year compensation), the employee-provided benefit rate is determined for all employees in the plan using the highest required rate of employee contributions applicable to any level of plan year compensation for that plan year.

(B) *Employer-provided benefits under a unit credit safe harbor plan.* For purposes of applying the safe harbor in § 1.401(a)(4)-3(b)(3) with respect to employer-provided benefits under a section 401(l) plan, an employee's gross benefit percentage, or an employee's excess benefit percentage and base benefit percentage, are reduced by subtracting the employees provided benefit rate determined under paragraph (b)(2)(iii)(A) of this section from the respective percentages for the plan year. For purposes of applying the safe harbor in § 1.401(a)(4)-3(b)(3) with respect to employer-provided benefits under a plan other than a section 401(l) plan, the employee's entire accrued benefit is treated as employer-provided.

(C) *Employer-provided benefits under the general test.* For purposes of applying the general test of § 1.401(a)(4)-3(c) with respect to employer-provided benefits, an employee's normal and most valuable accrual rates otherwise determined under § 1.401(a)(4)-3(d) are reduced by subtracting the employee-provided benefit rate determined under paragraph (b)(2)(iii)(A) of this section from the respective accrual rates. This adjustment is made before applying the optional rules in § 1.401(a)(4)-3(d)(6)(ii), (iv), (v), and (vi) (regarding imputation of permitted disparity, grouping of accrual rates, floor on most valuable accrual rates, and adjustment for certain disability benefits, respectively). If employee contributions were not required, or were required at a different rate (or rates), in prior plan years than in the current plan year, a plan may not use the accrued-to-date or projected method in § 1.401(a)(4)-3(d) (3) and (4).

The plan may, however, use one of the fresh-start alternatives to these methods in § 1.401(a)(4)–3(d)(6) (vii) and (viii), provided that the plan uses a fresh-start date that is no earlier than the last day of the last plan year in which employee contributions were not required at the rate (or rates) applicable for the current plan year.

(iv) *Determination of plan factor.* The factor for a plan is determined under the following table based on the average entry age of the employees in the plan and on whether or not the plan determines benefits based on average compensation. For this purpose, average entry age equals the average attained age of all employees in the plan, minus the average years of participation of all employees in the plan. A plan is treated as determining benefits based on average compensation if it determines benefits based on compensation averaged over a specified period not exceeding 5 consecutive years (or the employee's entire period of employment with the employer, if shorter).

TABLE OF FACTORS

Average entry age	Factor	
	Average compensation benefit formula	Other formulas
Less than 30	0.5	0.75
30 to 40	0.4	0.6
Over 40	0.2	0.3

(v) *Examples.* The following examples illustrate the rules of this paragraph (b)(2).

Example 1. Plan A is a contributory DB plan that is a defined benefit excess plan providing a benefit equal to 2.0 percent of the employee's average annual compensation at or below covered compensation, plus 2.5 percent of average annual compensation above covered compensation, times years of service up to 35. Under the plan, average annual compensation is determined using a 5-consecutive-year period for purposes of § 1.401(a)(4)–3(e)(2). The plan requires employee contributions at a rate of 4 percent of plan year compensation for all employees. Assume that the plan satisfies the demographic requirements of paragraph (b)(2)(ii)(B) of this section. Under these facts, the plan satisfies the eligibility requirements of paragraph (b)(2)(ii) of this section. Assume, further, that the average attained age for all employees in the plan is 55, and that the average years of participation of all employees in the plan is 10. The average entry age for the plan is therefore 45, and, accordingly, the appropriate factor under the table is 0.2. Thus, for a plan year, an employee's employee-provided benefit rate is 0.8 percent (4 percent × 0.2). In applying the safe harbor requirements of § 1.401(a)(4)–3(b)(3) to this plan (including the requirements of § 1.401(l)–3), the employee's base benefit percentage is 1.2 percent, and the employee's excess benefit percentage is 1.7.

Example 2. The facts are the same as in *Example 1*, except that the employee contribution rate is 2 percent of plan year compensation for the first $20,000, and 4 percent for plan year compensation at or above that amount. In determining the employee-provided benefit rate under the plan using the table in paragraph (b)(2)(iv) of this section, all employees are assumed to make employee contributions at the 4 percent rate. Thus, for a plan year, an employee's employee-provided benefit rate is 0.8 percent (4 percent × 0.2). In applying the safe harbor requirements of § 1.401(a)(4)–3(b)(3) to this plan (including the requirements of § 1.401(l)–3), the employee's base benefit percentage is 1.2 percent, and the employee's excess benefit percentage is 1.7.

Example 3. The facts are the same as in *Example 1*, except that the plan is tested using the general test in § 1.401(a)(4)–3(c). Assume Employee X participates in Plan A and has a normal accrual rate for the plan year (calculated with respect to Employee X's total accrued benefit) of 2.2 percent of testing compensation before applying any of the optional rules in § 1.401(a)(4)–3(d)(6)(ii), (iv), (v), and (vi). In applying the general test in § 1.401(a)(4)–3(c) with respect to employer-provided benefits, this rate is reduced by 0.8 to yield a normal accrual rate of 1.4 percent. This rate may then be adjusted using any of the optional rules in § 1.401(a)(4)–3(d)(6)(ii), (iv), (v), and (vi).

(3) *Minimum benefit method*—(i) *Application of uniform factors.* A contributory DB plan that satisfies the uniform rate requirement of paragraph (b)(2)(ii)(A) of this section and the minimum benefit requirement of paragraph (b)(3)(ii) of this section may apply the adjustments provided in paragraph (b)(2)(iii) of this section as if the average entry age of employees in the plan were between 30 and 40. Thus, if this minimum benefit requirement is satisfied, a plan need not satisfy the demographic requirements of paragraph (b)(2)(ii)(B) of this section or actually determine the average entry age of the employees in the plan.

(ii) *Minimum benefit requirement.* This requirement is satisfied if the plan provides that, in plan years beginning after December 31, 1991, each employee will accrue a benefit that equals or exceeds the sum of—

(A) The accrued benefit derived from employee contributions made for plan years beginning after December 31, 1991, determined in accordance with section 411(c), and

(B) Fifty percent of the total benefit accrued in plan years beginning after December 31, 1991, as determined under the plan benefit formula without regard to that portion of the formula designed to satisfy the minimum benefit requirement of this paragraph (b)(3)(ii).

(iii) *Example.* The following example illustrates the minimum benefit method of this paragraph (b)(3).

Example. Plan A is contributory DB plan. For the plan year beginning in 1992, Employee X participates in Plan A and accrues a benefit under the terms of the plan (without regard to the minimum benefit requirement of paragraph (b)(3)(ii) of this section) of $3,000. The portion of Employee X's benefit accrual for the plan year beginning in 1992 derived from employee contributions is $2,000, determined by applying the rules of section 411(c) to such contributions. The requirement of paragraph (b)(3)(ii) of this section is not satisfied for the plan year beginning in 1992 unless the plan provides that Employee A's benefit accrual for the plan year beginning in 1992 is equal to $3,500 ($2,000 plus 50 percent of $3,000).

(4) *Grandfather rule for plans in existence on May 14, 1990.* A contributory DB plan that satisfies the requirements of paragraph (c)(4) of this section may determine an employee's employer-provided benefit by subtracting from the employee's total benefit the employee-provided benefits determined using any reasonable method set forth in the plan, provided that it is the same method used in determining whether the plan satisfies paragraph (c)(4)(iv) of this section.

(5) *Government plan method.* A contributory DB plan that is established and maintained for its employees by the government of any state or political subdivision or by any agency or instrumentality thereof may treat an employee's total benefit as entirely employer-provided.

(6) *Cessation of employee contributions method.* If a contributory DB plan provides that no employee contributions may be made to the plan for plan years beginning after December 31, 1991, the plan may treat an employee's total benefit as entirely employer-provided.

(c) *Rules applicable in determining whether employee-provided benefits are nondiscriminatory in amount*—(1) *In general.* A contributory DB plan satisfies § 1.401(a)(4)-1(b)(2) with respect to the amount of employee-provided benefits for a plan year only if the plan satisfies the requirements of paragraph (c)(2), (c)(3), or (c)(4) of this section for the plan year. This requirement applies regardless of the method used to determine the amount of employer-provided benefits under paragraph (b) of this section.

(2) *Same rate of contributions.* This requirement is satisfied for a plan year if the plan requires all employees in the plan to make employee contributions at

the same rate (expressed as a percentage of plan year compensation) for the plan year

(3) *Total benefits method* This requirement is satisfied for a plan year if—

(i) The total benefits (i.e., the sum of employer-provided and employee-provided benefits) under the plan would satisfy § 1.401(a)(4)–3 if all benefits were treated as employer-provided benefits, and

(ii) The plan either—

(A) Requires all employees in the plan with plan year compensation at or above a stated dollar amount to make employee contributions at the same rate (expressed as a percentage of plan year compensation), and does not require employees with plan year compensation below that amount to make employee contributions, or

(B) Requires all employees in the plan to make employee contributions at the same rate (expressed as a percentage of plan year compensation) with respect to plan year compensation up to a stated dollar amount, and at a higher rate (expressed as a percentage of plan year compensation) that is the same for all employees in the plan with respect to plan year compensation at or above the amount.

(4) *Grandfather rule for plans in existence on May 14, 1990.* This requirement is satisfied for a plan year if all the following requirements are met—

(i) On May 14, 1990, the plan required employee contributions at a greater rate (expressed as a percentage of compensation) at higher levels of compensation than at lower levels of compensation;

(ii) The required rate of employee contributions is not increased after May 14, 1990, although the level of compensation at which employee contributions are required may be increased or decreased;

(iii) For plan years beginning after December 31, 1991, all employees in the plan are permitted to make employee contributions under the plan at a uniform rate with respect to all compensation; and

(iv) The benefits provided on account of employee contributions at lower levels of compensation are comparable to those provided on account of employee contributions at higher levels of compensation.

§ 1.401(a)(4)–7 Imputation of permitted disparity.

(a) *Introduction*—(1) *In general.* In determining whether a plan satisfies section 401(a)(4) with respect to the amount of contributions or benefits, section 401(a)(5)(C) allows the disparities permitted under section 401(l) to be taken into account. For purposes of satisfying the safe harbors of §§ 1.401(a)(4)–2(b)(3) and 1.401(a)(4)–3(b), permitted disparity may be taken into account only by satisfying section 401(l) in form in accordance with § 1 401(l)–2 or 1.401(l)–3, respectively. Alternatively, for purposes of the general tests of §§ 1.401(a)(4)–2(c) and 1.401(a)(4)–3(c), permitted disparity may be taken into account only in accordance with the rules of this section. In general, this section allows permitted disparity to be arithmetically imputed with respect to employer-provided contributions or benefits by determining an adjusted allocation or accrual rate that appropriately accounts for the permitted disparity with respect to each employee. This section contains the exclusive rules for imputing permitted disparity. See §§ 1.401(a)(4)–8(b)(2)(i)(D) and (c)(2)(i)(E) and 1.401(a)(4)–9(b)(2)(iv) for special rules applying the rules of this section with respect to equivalent allocation rates and equivalent accrual rates.

(2) *Overview.* Paragraph (b) of this section provides rules for imputing permitted disparity with respect to employer-provided contributions by adjusting each employee's unadjusted allocation rate. Paragraph (c) of this section provides rules for imputing permitted disparity with respect to employer-provided benefits by adjusting each employee's unadjusted accrual rate. Paragraph (d) of this section contains rules of general application.

(b) *Adjusting allocation rates*—(1) *In general.* This paragraph (b) provides rules for adjusting unadjusted allocation rates to take into account permitted disparity. These rules produce an adjusted allocation rate for each employee by determining the excess contribution percentage under the hypothetical formula that would yield the allocation actually received by the employee, if the plan took into account the full disparity permitted under section 401(l)(2) and used the taxable wage base as the integration level. This adjusted allocation rate is used to determine whether the amount of contributions under the plan satisfies the general test of § 1.401(a)(4)–2(c) and to apply the average benefit percentage test on the basis of contributions under § 1.410(b)–5(d)(5) or (e)(2). Paragraph (b)(2) of this section applies to employees whose plan year compensation does not exceed the taxable wage base, and paragraph (b)(3) of this section applies to employees whose plan year compensation exceeds the taxable wage base. Paragraph (b)(4) of this section provides definitions, and paragraph (b)(5) of this section provides an example.

(2) *Employees whose plan year compensation does not exceed taxable wage base* If an employee's plan year compensation does not exceed the taxable wage base, the employee's adjusted allocation rate is the lesser of the A rate and the B rate determined under the formulas below. where the permitted disparity rate and the unadjusted allocation rate are determined under paragraphs (b)(4) (ii) and (iv) of this section, respectively.

A Rate = 2 × unadjusted allocation rate.

B Rate = unadjusted allocation rate + permitted disparity rate.

(3) *Employees whose plan year compensation exceeds taxable wage base.* If an employee's plan year compensation exceeds the taxable wage base, the employee's adjusted allocation rate is the lesser of the C rate and the D rate determined under the formulas below, where allocations and the permitted disparity rate are determined under paragraphs (b)(4) (i) and (ii), respectively.

$$\text{C Rate} = \frac{\text{allocations}}{\text{plan year compensation} - \tfrac{1}{2}\ \text{taxable wage base}}$$

$$\text{D Rate} = \frac{\text{allocations} + (\text{permitted disparity rate} \times \text{taxable wage base})}{\text{plan year compensation}}$$

(4) *Definitions.* In applying this paragraph (b), the following definitions govern.

(i) *Allocations. Allocations* means the amount determined by multiplying the employee's plan year compensation by the employee's unadjusted allocation rate.

(ii) *Permitted disparity rate*—(A) *In general. Permitted disparity rate* means the rate in effect as of the beginning of the plan year under section 401(l)(2)(A)(ii) (e.g., 5.7 percent for plan years beginning in 1990).

(B) *Cumulative permitted disparity limit.* Notwithstanding paragraph (b)(4)(ii)(A) of this section, the permitted disparity rate is zero for an employee who has benefited under a defined benefit plan taken into account under § 1.401(l)–5(a)(3) for any plan year beginning after December 31, 1991, if imputing permitted disparity would result in a cumulative disparity fraction for the employee, as defined in § 1.401(l)–5(c)(2), that exceeds 35. An

employee is not treated as benefiting under a defined benefit plan for a plan year beginning after December 31, 1991, if the employer can establish that for that plan the defined benefit plan was not a section 401(l) plan and did not impute permitted disparity under this section. For purposes of this paragraph (b)(4)(ii)(B), a DB/DC plan (as described in § 1.401(a)(4)–9(a)) and a target benefit plan (that satisfies § 1.401(a)(4)–8(b)(3)) are treated as defined benefit plans, but a cash balance plan (that satisfies § 1.401(a)(4)–8(c)(3)) is treated as a defined contribution plan. Thus, for example, if, for any plan year beginning after December 31, 1991, an employee benefits under a defined contribution plan that is included in a DB/DC plan that imputes permitted disparity under this section, the employee is treated as benefiting under a defined benefit plan.

(iii) *Taxable wage base. Taxable wage base* means the taxable wage base, as defined in § 1.401(l)–1(c)(32), in effect at the beginning of the plan year.

(iv) *Unadjusted allocation rate. Unadjusted allocation rate* means the employee's allocation rate determined under § 1.401(a)(4)–2(c)(2)(i) for the plan year (expressed as a percentage of plan year compensation), without imputing permitted disparity under this section.

(5) *Example.* (a) Employees M and N participate in a profit-sharing plan maintained by Employer X. Employee M has plan year compensation of $30,000 in the 1990 plan year and has an unadjusted allocation rate of 5 percent. Employee N has plan year compensation of $100,000 in the 1990 plan year and has an unadjusted allocation rate of 8 percent. The taxable wage base in 1990 is $51,300.

(b) Because Employee M's plan year compensation does not exceed the taxable wage base, Employee M's A rate is 10 percent (2 × 5 percent), and Employee M's B rate is 10.7 percent (5 percent + 5.7 percent). Thus, Employee M's adjusted allocation rate is 10 percent, the lesser of the A rate and the B rate.

(c) Employee N's allocations are $8,000 (8 percent × $100,000). Because Employee N's plan year compensation exceeds the taxable wage base, Employee N's C rate is 10.76 percent ($8,000 divided by ($100,000 − (½ × $51,300))), and Employee N's D rate is 10.92 percent (($8,000 + (5.7 percent × $51,300)) divided by $100,000). Thus, Employee N's adjusted allocation rate is 10.76 percent, the lesser of the C rate and the D rate.

(c) *Adjusting accrual rates*—(1) *In general.* This paragraph (c) provides rules for adjusting unadjusted accrual rates to take into account permitted disparity. These rules produce an adjusted accrual rate for each employee by determining the excess benefit percentage under the hypothetical plan formula that would yield the employer-provided accrual actually received by the employee, if the plan took into account the full permitted disparity under section 401(l)(3)(A) in each of the first 35 years of an employee's testing service under the plan and used the employee's covered compensation as the integration level. This adjusted accrual rate is used to determine whether the amount of employer-provided benefits under the plan satisfies the alternative safe harbor for flat benefit plans under § 1.401(a)(4)–3(b)(6) or the general test of § 1.401(a)(4)–3(c), and to apply the average benefit percentage test on the basis of benefits under § 1.401(b)–5 (d)(6) or (e)(2). Paragraph (c)(2) of this section applies to employees whose testing compensation does not exceed covered compensation, and paragraph (c)(3) of this section applies to employees whose testing compensation exceeds covered compensation. Paragraph (c)(4) of this section provides definitions, and paragraph (c)(5) of this section provides an example.

(2) *Employees whose testing compensation does not exceed covered compensaton.* If an employee's testing compensation does not exceed the employee's covered compensation, the employee's adjusted accrual rate is the lesser of the A rate and the B rate determined under the formulas below, where the permitted disparity factor and the unadjusted accrual rate are determined under paragraph (c)(4) (iii) and (vi) of this section, respectively.

A Rate = 2 × unadjusted accrual rate

B Rate = unadjusted accrual rate + permitted disparity factor

(3) *Employees whose testing compensation exceeds covered compensation.* If an employee's testing compensation exceeds the employee's covered compensation, the employee's adjusted accrual rate is the lesser of the C rate and D rate determined under the formulas below, where the employer-provided accrual and the permitted disparity factor are determined under paragraph (c)(4) (ii) and (iii) of this section respectively.

$$\text{C Rate} = \frac{\text{employer-provided accrual}}{\text{testing compensation} - \tfrac{1}{2}\text{ covered compensation}}$$

$$\text{D Rate} = \frac{\text{employer-provided accrual} + (\text{permitted disparity factor} \times \text{covered compensation})}{\text{testing compensation}}$$

(4) *Definitions.* For purposes of this paragraph (c), the following definitions apply.

(i) *Covered compensation. Covered compensation* means covered compensation as defined in § 1.401(l)–1(c)(7). Notwithstanding § 1.401(l)–1(c)(7)(iii), an employee's covered compensation must be automatically adjusted each plan year for purposes of applying this paragraph (c).

(ii) *Employer-provided accrual. Employer-provided accrual* means the amount determined by multiplying the employee's testing compensation by the employee's unadjusted accrual rate.

(iii) *Permitted disparity factor*—(A) *In general. Permitted disparity factor* for an employee means the employee's annual permitted disparity factor determined under paragraph (c)(4)(iii)(B) of this section, adjusted as provided in paragraph (c)(4)(iii) (C), (D), or (E) of this section for the annual method, the accrued-to-date method, or the projected method, whichever is applicable. Paragraph (c)(4)(iii)(F) of this section contains rules for satisfying the overall permitted disparity limits under section 401(l). The permitted disparity factor must be determined under the same method for all employees in the plan, unless otherwise provided (see, e.g., the special rules for terminated employees and section 401(a)(17) employees in § 1.401(a)(4)–3 (d)(3)(iii), (d)(4)(iii), (d)(4)(iv), (d)(6)(viii)(D)).

(B) *Annual permitted disparity factor.* An employee's annual permitted disparity factor is 0.75 percent adjusted, pursuant to § 1.401(l)–3(e), using as the age at which benefits commence the lesser of age 65 or the employee's testing age. For example, if the employee's testing age is 62, the annual permitted disparity factor is 0.6 percent for an employee whose social security retirement age is 65. Generally, if the employee's testing age is 65, the annual permitted disparity factor is 0.75 percent for an employee whose social security retirement age is 65, 0.70 percent for an employee whose social security retirement age is 66, and 0.65 percent for an employee whose social security retirement age is 67. For this purpose, a plan is permitted to treat all employees (of whatever age) as having a social security retirement age of 67. Thus, the plan may use an annual permitted disparity factor of 0.65 percent for all employees in the plan whose testing age is 65. No adjustments are made in the annual permitted disparity factor unless an employee's testing age is different from the employee's social security retirement age.

(C) *Annual method.* If unadjusted accrual rates are determined under the annual method of § 1.401(a)(4)–3(d)(2), the permitted disparity factor for an

employee is generally the annual disparity factor In the case of an employee with more than 35 years of testing service, the permitted disparity factor for the current plan year is zero.

(D) *Accrued-to-date method.* If unadjusted accrual rates are determined under the accrued-to-date method of § 1.401(a)(4)–3(d)(3), and employee's permitted disparity factor is determined as follows—

(*1*) *General rule.* The permitted disparity factor is equal to the annual permitted disparity factor for the employee multiplied by the employee's testing service (not to exceed 35), and then divided by the employee's testing service.

(*2*) *Fresh-start alternative.* If a plan uses the fresh-start alternative for the accrued-to-date method under § 1.401(a)(4)–3(d)(6)(vii), the permitted disparity factor is equal to the annual permitted disparity factor for the employee multiplied by the employee's testing service since the fresh-start date (not to exceed 35 minus the employee's testing service as of the fresh-start date), and then divided by the employee's testing service since the fresh-start date.

(E) *Projected method.* If unadjusted accrual rates are determined under the projected method of § 1.401(a)(4)–3(d)(4), an employee's permitted disparity factor is determined as follows—

(*1*) *General rule.* The permitted disparity factor is equal to the annual permitted disparity factor for the employee multiplied by the employee's projected testing service (not to exceed 35), and then divided by the employee's projected testing service.

(*2*) *Fresh-start alternative.* If a plan uses the fresh-start alternative for the projected method under § 1.401(a)(4)–3(d)(6)(viii), the permitted disparity factor is equal to the annual permitted disparity factor for the employee multiplied by the employee's projected testing service since the fresh-start date (not to exceed 35 minus the employee's testing service as of the fresh-start date), and then divided by the employee's projected testing service since the fresh-start date.

(*3*) *Projected testing service.* For purposes of this paragraph (c)(4)(iv)(E), an employee's projected testing service is the testing service used in determining the employee's unadjusted accrual rate.

(F) *Cumulative permitted disparity limit.* The 35 years used in paragraph (c)(4)(iii) (C), (D)(*1*), and (E)(*1*) of this section must be reduced by the employee's cumulative disparity fraction, as defined in § 1.401(l)–5(c)(2), determined solely with respect to the employee's total years of service under all other plans taken into account under § 1.401(l)–5(a)(3) The 35 years used in paragraph (c)(4)(iii) (D)(*2*) and (E)(*2*) of this section must be reduced by the employee's cumulative disparity fraction, as defined in § 1.401(l)–5(c)(2), determined solely with respect to the employee's total years of service under all other plans taken into account under § 1.401(l)–5(a)(3) for plan years of those other plans ending after the fresh-start date.

(iv) *Social security retirement age. Social security retirement age* means social security retirement age as defined in section 415(b)(8).

(v) *Testing compensation. Testing compensation* means average annual compensation as defined in § 1.401(a)(4)–3(e)(2), modified (if applicable) in accordance with § 1.401(a)(4)–3(e)(3)(iii). However, if unadjusted accrual rates are determined under the annual method of § 1.401(a)(4)–3(d)(2), testing compensation may be determined using plan year compensation.

(vi) *Unadjusted accrual rate. Unadjusted accrual rate* means the normal or most valuable accrual rate, whichever is being determined for the employee under § 1.401(a)(4)–3(d), expressed as a percentage of testing compensation, without imputing permitted disparity under this section.

(5) *Example.* The following example illustrates the application of this definition.

Example. (a) Employees M and N participate in a defined benefit plan that uses a normal retirement age of 65. The plan is being tested for the plan year under § 1.401(a)(4)–3(c), using unadjusted accrual rates determined under the annual method of § 1.401(a)(4)–3(d)(2). Employee M has an unadjusted normal accrual rate of 1.48 percent, testing compensation of $21,000, and an employer-provided accrual of $311 (1.48 percent × $21,000). Employee N has an unadjusted normal accrual rate of 1.7 percent, testing compensation of $106,000, and an employer-provided accrual of $1,802 (1.7 percent × $106,000). The covered compensation of both Employees M and N is $25,000, and social security retirement age for both employees is 65. Neither employee has testing service of more than 35 years and neither has ever participated in another plan.

(b) Because Employee M's testing compensation does not exceeds covered compensation, Employee M's A rate is 2.96 percent (2 × 1.48 percent), and Employee M's B rate is 2.23 percent (1.48 percent + 0.75 percent). Thus, Employee M's adjusted accrual rate is 2.23 percent, the lesser of the A rate and the B rate.

(c) Because Employee N's testing compensation exceeds covered compensation, Employee N's C rate is 1.93 percent ($1,802/($106,000 minus (0.5 × $25,000))), and Employee N's D rate is 1.88 percent (($1,802 + (0.75 percent × 25,000))/$106,000). Thus Employee N's adjusted accrual rate is 1 88 percent the lesser of the C rate and the D rate

(d) *Rules of general application*—(1) *Eligible plans* The rules in this section may be used only for those plans to which the permitted disparity rules of section 401(l) are available. Therefore, these rules may generally not be used, for example, by an employer (determined for purposes of the Federal Insurance Contributions Act or the Railroad Retirement Tax Act) not subject to the tax under section 3111(a) or 3221. See § 1.401(l)–1(a)(3) for other arrangements to which section 401(l) is not available.

(2) *Consistency.* In general, if the rules of this section are applied to a plan, permitted disparity must be imputed for all employees in the plan. However, permitted disparity need not be imputed for employees, including self-employed individuals within the meaning of section 401(c)(1), not covered by the any of the taxes under section 3111(a), section 3221, or section 1401, provided that permitted disparity is not imputed for any of those employees. In addition, permitted disparity may not be imputed for an employee if imputation would violate the overall permitted disparity rules of § 1.401(l)–5. See paragraph (d)(3) of this section.

(3) *Overall permitted disparity.* The annual overall permitted disparity limits of § 1.401(l)–5(b) apply to the employer-provided contributions and benefits for an employee under all plans taken into account under § 1.401(l)–5(a)(3). Thus, if an employee who benefits under the plan for the current plan year also benefits under a section 401(l) plan for the plan year ending with or within the current plan year, permitted disparity may not be imputed for that employee for the plan year. Similarly, if an employee who benefits under the plan for the current plan year also benefits under another plan of the employer for the plan year ending with or within the current plan year, disparity may be imputed for that employee under only one of the plans. See § 1.401(l)–5(b)(9), *Example 4.*

(4) *Relationship to the other adjustments.* Permitted disparity is imputed under this section after taking into account the value of any includible disability benefits under § 1.401(a)(4)–3(d)(6)(vi) and before grouping allocation or accrual rates under § 1.401(a)(4)–2(c)(2)(v) or 1.401(a)(4)–3(d)(6)(iv).

(5) *Compensation used for amounts testing.* In applying §§ 1.401(a)(4)–2, 1.401(a)(4)–3, 1.401(a)(4)–8, 1.401(a)(4)–9, and 1.410(b)–5 to the amount of contributions or benefits under the plan,

a plan that imputes permitted disparity must use the same amount of plan year compensation that is used in adjusting allocation rates under paragraph (b) of this section or the same amount of testing compensation that is used in adjusting accrual rates under paragraph (c) of this section, as applicable. Thus, for example, if an employee's unadjusted accrual rates are determined based on testing compensation of $26,512, that same amount of testing compensation must be used to compute the employees' adjusted accrual rates under paragraph (c) of this section.

§ 1.401(a)(4)-8 Cross-testing.

(a) *Introduction*—(1) *Overview.* In order to satisfy section 401(a)(4), either the contributions or the benefits provided under a plan must be nondiscriminatory in amount. See § 1.401(a)(4)-1(b)(2). Whether a defined contribution plan satisfies this requirement is generally determined on a contributions basis under § 1.401(a)(4)-2. As an alternative, however, a defined contribution plan may be tested with respect to the equivalent amount of benefits under the rules provided in paragraph (b) of this section. This alternative is not available to an ESOP, a section 401(k) plan, or a section 401(m) plan. Similarly, whether a defined benefit plan discriminates in favor of highly compensated employees with respect to the amount of employer-provided contributions or benefits is generally determined on a benefits basis under § 1.401(a)(4)-3. As an alternative, however, a defined benefit plan may be tested with respect to the equivalent amount of contributions under the rules provided in paragraph (c) of this section. Paragraphs (b) and (c) of this section generally require the determination of individual equivalent accrual or allocation rates. Paragraphs (b)(3), (c)(3), and (d) of this section, however, contain additional safe harbor testing methods for target benefit plans, cash balance plans, and defined benefit plans that are part of floor-offset arrangements, respectively, that generally may be satisfied on a design basis.

(2) *Separate testing of employer-provided and employee-provided benefits.* This section applies solely for purposes of determining whether a plan satisfies the nondiscriminatory amount requirement of § 1.401(a)(4)-1(b)(2) with respect to the amount of employer-provided benefits or contributions. In the case of a contributory DB plan tested under paragraph (c)(1) of this section, the rules in § 1.401(a)(4)-6(b)(1) (section 411(c) method), (b)(5) (government plan method), or (b)(6) (cessation-of-employee-contributions method) must be used to determine the amount of each employee's employer-provided benefit. See § 1.401(a)(4)-2(d)(2) for the exclusive rules for determining whether a plan consisting of employee contributions allocated to separate accounts satisfies the nondiscriminatory amount requirement of § 1.401(a)(4)-1(b)(2).

(b) *Nondiscrimination in amount of benefits provided under a defined contribution plan*—(1) *General rule.* A defined contribution plan satisfies section 401(a)(4) with respect to an equivalent amount of benefits for a plan year if each rate group under the plan satisfies section 410(b). For purposes of this paragraph (b)(1), a rate group exists under the plan for each highly compensated employee in the plan and consists of the highly compensated employee and all other employees (both highly and nonhighly compensated) in the plan who have an equivalent accrual rate greater than or equal to the highly compensated employee's equivalent accrual rate. Thus, an employee is in the rate group for each highly compensated employee in the plan who has an equivalent accrual rate less than or equal to the employee's equivalent accrual rate. Whether a rate group satisfies section 410(b) is determined by applying the rules in § 1.401(a)(4)-3(c)(3). Allocations under a defined contribution plan are converted into equivalent accrual rates for this purpose using either the annual or the accrued-to-date method in paragraph (b)(2) of this section. Paragraph (b)(3) of this section contains an optional design-based testing method for target benefit plans.

(2) *Determination of equivalent accrual rates*—(i) *Annual method.* Amounts allocated to employees' accounts under a defined contribution plan for a plan year are converted into equivalent accrual rates under the annual method as follows—

(A) Determine the dollar amount of the allocations under the plan taken into account under § 1.401(a)(4)-2(c)(2)(ii) for the plan year with respect to each employee.

(B) Normalize each amount determined under paragraph (b)(2)(i)(A) of this section. For this purpose, the amount determined in paragraph (b)(2)(i)(A) of this section is treated as a single-sum benefit that is immediately and unconditionally payable to the employee. The interest rate used for this purpose must be a standard interest rate, and the straight life annuity factor must be based on the same or a different standard interest rate and a standard mortality table. The life annuity factor must be based on the employee's testing age determined without regard to paragraph (4) of the definition of testing age in § 1.401(a)(4)-12 (current-age rule). All actuarial assumptions used for this purpose must be applied on a consistent basis to all employees in the plan.

(C) Express the annual payment under each normalized annuity determined under paragraph (b)(2)(i)(B) of this section either as a dollar amount or as a percentage of the employee's testing compensation for the plan year. If testing compensation is defined as plan year compensation, the modifications in § 1.401(a)(4)-3(e)(3)(ii) do not apply.

(D) The employer may impute permitted disparity to the extent allowed under the rules of § 1.401(a)(4)-7 using the annual method in § 1.401(a)(4)-7(c)(4)(iv)(C). In determining each employee's adjusted accrual rate for purposes of that section, the amount determined under paragraph (b)(2)(i)(C) of this section is substituted for the employee's unadjusted accrual rate.

(E) The employer may apply the grouping rules of § 1.401(a)(4)-3(d)(6)(iv) to the equivalent accrual rates determined under paragraph (b)(2)(i)(C) of this section (or, if permitted disparity is taken into account, paragraph (b)(2)(i)(D) of this section.

(ii) *Accrued-to-date method*—(A) *General rule.* A method analogous to the accrued-to-date method in § 1.401(a)(4)-3(d)(3) may be used instead of the annual method in paragraph (b)(2)(i) of this section to determine employees' equivalent accrual rates under a defined contribution plan for a plan year. If this method is used, each employee's equivalent accrual rate is determined by substituting the employee's adjusted account balance (within the meaning of paragraph (b)(2)(ii)(C) of this section) for the plan year, divided by the employee's testing service for the plan year, for the amount determined under paragraph (b)(2)(i)(A) of this section. In addition, in applying the normalization requirement in paragraph (b)(2)(i)(B) of this section, the employee's testing age is determined without regard to paragraph (4) of the definition of testing age in § 1.401(a)(4)-12 (current-age rule) for all purposes, and not merely for purposes of determining the straight life annuity factor that must be applied. If testing compensation is defined as plan year compensation, the modifications in § 1.401(a)(4)-3(e)(3)(ii) (A) and (B) must be made. In addition, if permitted disparity is taken into account under paragraph (b)(2)(i)(D) of this section, the accrued-to-date method in § 1.401(a)(4)-7(c)(4)(iv)(D) must be applied.

(B) *Fresh-start alternative.* The accrued-to-date method provided in this paragraph (b)(2)(ii) may be applied solely with respect to testing service during, and adjusted account balances attributable to allocations made for, plan years beginning after a fresh-start date.

(C) *Determination of adjusted account balance.* For purposes of this paragraph (b)(2)(ii), an employee's adjusted account balance is the employee's actual account balance attributable to allocations taken into account under § 1.401(a)(4)–2(c)(2)(ii) for all plan years taken into account under this paragraph (b)(2)(ii), plus any additional amounts that would have been included in that portion of the account balance but for the fact that they were previously distributed (including an adjustment for interest that would have been earned with respect to such prior distributions calculated at a rate of interest that is reasonably consistent with the investment performance of the plan). For purposes of the foregoing, an employer may disregard distributions made to a nonhighly compensated employee, as well as distributions made to any employee in plan years beginning before a selected date no later than January 1, 1986, that is the same for all employees in the plan.

(3) *Safe harbor testing method for target benefit plans*—(i) *General rule.* A target benefit plan is a money purchase pension plan under which contributions to an employee's account are determined by reference to the amounts necessary to fund the employee's stated benefit under the plan. Whether a target benefit plan satisfies section 401(a)(4) with respect to an equivalent amount of benefits is generally determined under paragraphs (b)(1) and (b)(2) of this section. A target benefit plan is deemed to satisfy section 401(a)(4) with respect to an equivalent amount of benefits, however, if each of the following requirements is satisfied—

(A) *Form of plan.* The plan satisfies the uniformity requirements of § 1.401(a)(4)–2(b)(2) (regarding a plan's normal retirement age, allocation formula, and vesting and service-crediting rules), taking into account the relevant exceptions provided in § 1.401(a)(4)–2(b)(5).

(B) *Stated benefit formula.* Each employee's stated benefit is determined under a unit credit fractional rule or flat benefit formula that would satisfy the requirements of § 1.401(a)(4)–3(b) (4) or (b)(5), respectively, and that would satisfy each of the uniformity requirements in § 1.401(a)(4)–3(b)(2) (taking into account the relevant exceptions provided in § 1.401(a)(4)–3(b)(8)), if the plan were a defined benefit plan with the same benefit formula. In determining whether these requirements are satisfied, the stated benefit at normal retirement age is assumed to accrue ratably over each employee's period of plan participation through normal retirement age for which the employee was covered by the stated benefit formula in accordance with § 1.401(a)(4)–3(b)(4)(i)(B) or (b)(5)(i)(B). In addition, the rules of § 1.401(a)(4)–3(f) do not apply. An employee's stated benefit may not take into account years in which the employee did not participate in the plan or in which the plan did not satisfy this paragraph (b)(3). See § 1.401(a)(4)–13(e)(1) for a special rule treating certain plans as satisfying this paragraph (b)(3) in years prior to the effective date applicable to the plan under § 1.401(a)(4)–13 (a) or (b).

(C) *Employer contributions.* Employer contributions with respect to each employee are based exclusively on the employee's stated benefit using the method provided in paragraph (b)(3)(iv) of this section, and forfeitures and any other amounts under the plan taken into account under § 1.401(a)(4)–2(c)(2)(ii) are used exclusively to reduce employer contributions.

(D) *Employee contributions.* Employee contributions (if any) are not used to fund the stated benefit.

(E) *Permitted disparity.* If permitted disparity is taken into account, the stated benefit formula satisfies § 1.401(l)–3. For this purpose, the 0.75-percent factor in the maximum excess or offset allowance in § 1.401(l)–3(b)(2)(i) or (b)(3)(i), respectively, as reduced in accordance with § 1.401(l)–3(d)(9) and (e), is further reduced by multiplying the factor by 0.80.

(ii) *Fresh-start rules*—(A) *In general.* A target benefit plan does not fail to satisfy this paragraph (b)(3) merely because an employee's stated benefit includes benefits attributable to plan years beginning before a fresh-start date that were determined under a benefit formula that differs from the benefit formula used to determine stated benefits in plan years beginning after the fresh-start date, provided the stated benefit formula satisfies § 1.401(a)(4)–13(c) with respect to benefits attributable to plan years beginning after the fresh-start date.

(B) *Additional requirements for plans that did not satisfy safe harbor in prior years.* If a plan was not a target benefit plan or did not satisfy this paragraph (b)(3) in the immediately preceeding plan year, the stated benefit formula must satisfy § 1.401(a)(4)–13(c) by applying the formula in § 1.401(a)(4)–13(c)(2) (formula without wear-away) with respect to benefits attributable to the current and subsequent plan years. For this purpose, each employee's frozen accrued stated benefit under such a plan for purposes of § 1.401(a)(4)–13(c)(2) must be treated as zero. Thus, an employee's stated benefit generally may not take into account service prior to the current plan year if the plan did not satisfy this paragraph (b)(3) in the preceding plan year. See § 1.401(a)(4)–13(e)(1) for a special rule treating certain target benefit plans as satisfying this paragraph (b)(3) in years prior to the effective date applicable to the plan under § 1.401(a)(4)–13 (a) or (b).

(iii) *Benefits and contributions after normal retirement age.* A target benefit plan may limit increases in the stated benefit (and contributions to fund those increases) after normal retirement age consistent with the requirements applicable to defined benefit plans under section 411(b)(1)(H) (without regard to section 411(b)(1)(H)(iii)), provided that the limitation applies on the same terms to all employees in the plan. Thus, post-normal retirement benefits required under § 1.401(a)(4)–3(b)(2)(iii) must be provided under the stated benefit formula, subject to any uniformly applicable service cap under the formula. In addition, actuarial increases in the stated benefit for delayed retirement may not be provided. See paragraph (b)(3)(i)(B) of this section (prohibiting application of § 1.401(a)(4)–3(f)(3)).

(iv) *Method for determining required employer contributions*—(A) *General rule.* An employer's required contribution to the account of an employee for a plan year is determined based on the employee's stated benefit and the amount of the employee's theoretical reserve as of the date the employer's required contribution is determined for the plan year (the "determination date"). Paragraph (b)(3)(iv)(B) of this section provides rules for determining an employee's theoretical reserve. Paragraphs (b)(3)(iv)(C) and (D) of this section provides rules for determining an employer's required contributions.

(B) *Theoretical reserve*—(*1*) *Initial theoretical reserve.* An employee's theoretical reserve as of the determination date for the first plan year in which the employee participates in the plan, and for the first plan year after any plan year in which the plan did not satisfy this paragraph (b)(3), is zero. See § 1.401(a)(4)–13(e)(2), however, for transition rules used in determining an employee's initial theoretical reserve under a plan that satisfied this paragraph (b)(3) or other applicable

nondiscrimination requirements prior to the effective date applicable to the plan under § 1.401(a)(4)–13 (a) or (b).

(*2*) *Theoretical reserve in subsequent plan years.* An employee's theoretical reserve as of the determination date for a plan year (other than a plan year described in paragraph (b)(3)(iv)(B)(*1*) of this section) is the employee's theoretical reserve as of the determination date for the prior plan year, plus the employer's required contribution for the prior plan year (as limited by section 415), both increased by interest from the determination date for the prior plan year through the determination date for the current plan year, but not beyond the determination date for the plan year that includes the employee's normal retirement date. (Thus, an employee's theoretical reserve as of the determination date for a plan year does not include the amount of the employer's required contribution for the plan year.) The interest rate for determining employer contributions that was in effect on the determination date in the prior plan year must be applied to determine the required interest adjustment for this period. For plan years beginning after the effective date applicable to the plan under § 1.401(a)(4)–13 (a) or (b), a standard interest rate must be used, and may not be changed except on the determination date for a plan year.

(C) *Required contributions for employees under normal retirement age.* The employer contributions required for purposes of paragraph (b)(3)(i)(C) of this section with respect to an employee whose attained age is less than the employee's normal retirement age must be determined for each plan year as follows—

(*1*) Determine the employee's fractional rule benefit under the plan's stated benefit formula in accordance with § 1.401(a)(4)–3 (b)(4)(i)(B) or (b)(5)(i)(B).

(*2*) Determine the actuarial present value of the fractional rule benefit determined in paragraph (b)(3)(iv)(C)(*1*) of this section as of the determination date for the current plan year, using a standard interest rate and a standard mortality table that are set forth in the plan and that are the same for all employees in the plan, and assuming no mortality before the employee's normal retirement age.

(*3*) Determine the excess, if any, of the amount determined in paragraph (b)(3)(iv)(C)(*2*) of this section over the employee's theoretical reserve for the current plan year determined under paragraph (b)(3)(iv)(B) of this section.

(*4*) Determine the required employer contribution for the current plan year by amortizing on a level basis the result in paragraph (b)(3)(iv)(C)(*3*) of this section over the period beginning with the determination date for the current plan year and ending with the determination date for the plan year in which the employee is projected to reach normal retirement age.

(D) *Required contributions for employees over normal retirement age.* The required employer contributions for purposes of paragraph (b)(3)(i)(C) of this section with respect to an employee whose attained age equals or exceeds the employee's normal retirement age is the excess of the actuarial present value, as of the determination date for the current plan year of the employee's stated benefit for the current plan year (determined using a straight life annuity factor based on the employee's normal retirement age, even though the employee's stated benefit commences as of the employee's current age) over the employee's theoretical reserve as of the determination date.

(v) *Effect of sections 415 and 416 requirements.* A target benefit plan does not fail to satisfy this paragraph (b)(3) merely because required contributions under the plan are limited by section 415 in a plan year or merely because additional contributions are made consistent with the requirements of section 416(c)(2) (regardless of whether the plan is top-heavy).

(vi) *Examples.* The following examples illustrate this paragraph (b)(3).

Example 1. (a) Employer X maintains a target benefit plan with a calendar plan year that bases contributions on a stated benefit equal to 40 percent of each employee's average annual compensation, reduced pro rata for years of service less than 25, payable annually as a straight life annuity commencing at normal retirement age. The UP–84 mortality table and an interest rate of 7.5 percent are used to calculate the contributions necessary to fund the stated benefit. Required contributions are determined on the last day of each plan year. The normal retirement age under the plan is 65. Employee A is 39 years old in 1992, has participated in the plan for 5 years, and has average annual compensation equal to $60,000 for the 1992 plan year. Assume that Employee A's theoretical reserve as of the last day of the 1991 plan year is $13,909, determined under § 1.401(a)(4)–13(e).

(b) Under these facts, Employer X's 1992 required contribution to fund Employee A's stated benefit is $1,318, calculated as follows—

(1) Employee A's fractional rule benefit is $24,000 (40 percent of Employee A's average annual compensation of $60,000).

(2) The actuarial present value of Employee A's fractional rule benefit as of the last day of the 1992 plan year is $30,960 (Employee A's fractional rule benefit of $24,000 multiplied by 1.290, the actuarial present value factor for an annuity commencing at age 65 applicable to a 39-year-old employee determined using the stated interest rate of 7.5 percent and the UP 84 mortality table, and assuming no mortality before normal retirement age)

(3) The actuarial present value of Employee A's fractional rule benefit ($30,960) is reduced by Employee A's theoretical reserve as of the last day of the 1992 plan year The theoretical reserve on that day is $14,744—the $13,909 theoretical reserve as of the last day of the 1991 plan year, increased by interest for one year at the rate of 6 percent. Because the required contribution for the 1991 plan year is taken into account under § 1.401(a)(4)–13(e)(2) in determining the theoretical reserve as of the last day of the 1991 plan year, it is not added to the theoretical reserve again in this paragraph (b)(3) of this *Example.* The resulting difference is $16,216 ($30,960 minus $14,744).

(4) The $16,216 excess of the actuarial present value of Employee A's fractional rule benefit over Employee A's theoretical reserve is multiplied by 0.0813, the amortization factor applicable to a 39-year-old employee determined using the stated interest rate of 7.5 percent. The product of $1,318 is the amount of the required employer contribution for Employee A for the 1992 plan year.

Example 2. (a) The facts are the same as in *Example 1,* except that as of January 1, 1993, the plan's stated benefit formula is amended to provide for a stated benefit equal to 45 percent of average annual compensation, reduced pro rata for years of service less than 25, payable annually as a straight life annuity commencing at normal retirement age. The plan provides that, if the stated benefit formula is amended, an employee's stated benefit under the plan is equal to the greater of the employee's frozen accrued stated benefit as of the last day of the plan year preceding the year in which such amendment first becomes effective, or the employee's stated benefit determined under the amended benefit formula applied for all years of service (i.e., the plan uses the fresh-start rule in § 1.401(a)(4)–13(c)(3) with respect to the stated benefit formula). For the 1993 plan year, Employee A's average annual compensation continues to be $60,000. The mortality table used for the calculation of the employer's required contributions remains the same as in the prior plan year, but the plan's stated interest rate is changed to 8 percent effective as of December 31, 1993.

(b) Under these facts, Employer X's required contribution for Employee A is $1,290, calculated as follows:

(1) Employee A's fractional rule benefit is $27,000 (45 percent of $60,000).

(2) The actuarial present value of Employee A's fractional rule benefit as of the last day of the 1993 plan year is $32,319 ($27,000 multiplied by 1.197, the actuarial present value factor for an annuity commencing at age 65 applicable to a 40-year-old employee, determined using the stated interest rate of 8 percent and the UP–84 mortality table, and assuming no mortality before normal retirement age).

(3) The actuarial present value of Employee A's fractional rule benefit ($32,319) is reduced by Employee A's theoretical reserve as of the last day of the 1993 plan year. The theoretical

reserve as of that day is $17,267—the $14,744 theoretical reserve as of the last day of the 1992 plan year plus the $1,318 required contribution for the 1992 plan year, both increased by interest for one year at the rate of 7.5 percent. The resulting difference is $15,052 ($32,319 minus $17,267).

(4) The result in paragraph (b)(3) of this *Example* is multiplied by 0.0857, the amortization factor applicable to a 40-year-old employee determined using the stated interest rate of 8 percent. The product, $1,290, is the amount of the required employer contribution for Employee A for the 1993 plan year.

(c) *Nondiscrimination in amount of contributions under a defined benefit plan*—(1) *General rule.* A defined benefit plan satisfies section 401(a)(4) with respect to an equivalent amount of contributions for a plan year if each rate group under the plan satisfies section 410(b). For purposes of this paragraph (c)(1), a rate group exists under a plan for each highly compensated employee in the plan and consists of the highly compensated employee and all other employees (both highly and nonhighly compensated) in the plan who have an equivalent normal allocation rate greater than or equal to the highly compensated employee's equivalent normal allocation rate, and who also have an equivalent most valuable allocation rate greater than or equal to the highly compensated employee's equivalent most valuable allocation rate. In the case of a defined benefit plan that satisfies the requirements necessary to use the alternative test in § 1.401(a)(4)–3(c)(2), however, a rate group consists of the highly compensated employee and all other employees (both highly and nonhighly compensated) in the plan who have an equivalent most valuable allocation rate greater than or equal to the highly compensated employee's equivalent most valuable allocation rate. Whether a rate group satisfies section 410(b) is determined by applying the rules in § 1.401(a)(4)–3(c)(3). Normal and most valuable benefits under a defined benefit plan are converted into equivalent normal and most valuable allocation rates using the methods in paragraph (c)(2) of this section. Paragraph (c)(3) of this section provides a safe harbor testing method for cash balance plans.

(2) *Determination of equivalent allocation rates*—(i) *Equivalent normal allocation rate.* Employees' accrued benefits under a defined plan for a plan year are converted into equivalent normal allocation rates as follows—

(A) Determine the increase in each employee's normalized accrued benefit under § 1.401(a)(4)–3(d)(2)(i) (A) through (E) for the plan year.

(B) Determine the actuarial present value of the increase in the employee's normalized accrued benefit determined under paragraph (c)(2)(i)(A) of this section as of the employee's testing age, using a standard interest rate and a standard mortality table that are applied uniformly to all employees in the plan.

(C) Determine the present value, as of the close of the plan year, of the amount determined under paragraph (c)(2)(i)(B) of this section using a standard interest rate that is the same for all employees in the plan. The interest rate used for this purpose may be different from the interest rate used in paragraph (c)(2)(i)(B) of this section.

(D) Express the amount determined under paragraph (c)(2)(i)(C) of this section as a dollar amount or as a percentage of the employee's plan year compensation of the plan year.

(E) Permitted disparity may be imputed to the extent allowed under the rules of § 1.401(a)(4)–7 using the method in § 1.401(a)(4)–7(b). In determining an employee's adjusted allocation rate under that section, the percentage amount determined under paragraph (c)(2)(i)(D) of this section is substituted for the employee's unadjusted allocation rate. If permitted disparity is taken into account, it must be taken into account for all employees in the plan.

(F) The employer may apply the grouping rules of § 1.401(a)(4)–2(c)(2)(v) to the equivalent normal allocation rates determined under paragraph (c)(2)(i)(D) of this section (or, if permitted disparity is taken into account, paragraph (c)(2)(i)(E) of this section.

(ii) *Equivalent most valuable allocation rate.* An employee's benefits under a defined benefit plan are converted into an equivalent most valuable allocation rate using the method set forth in paragraph (c)(2)(i) of this section, and substituting the largest normalized annuity determined under § 1.401(a)(4)(a)(4)–3(d)(2)(ii)(A) through (G) for each employee for the increase in the employee's normalized accrued benefit in paragraph (c)(2)(i)(A) of this section. An employer may use the rule in § 401(a)(4)–3(d)(6)(vi) to take the value of disability benefits provided under a plan into account in determining employee's equivalent most valuable allocation rates. If this option is used, the largest annuity described in this paragraph (c)(2)(ii) is multiplied by 1.11 before the employee's equivalent most valuable allocation rate is determined.

(iii) *Use of optional calculation methods.* Except as otherwise provided in this section, none of the optional methods available under § 1.401(a)(4)–3(d) for determining the amount of benefits used to determine an employee's normal and most valuable accrual rates, or for adjusting an employee's normal or most valuable accrual rates, are available in determining the employee's equivalent normal and most valuable allocation rates under this paragraph (c)(2). Thus, for example, a defined benefit plan that is being tested on the basis of equivalent contributions may take the value of disability benefits provided under a plan into account in determining employees' equivalent most valuable allocation rates as provided in paragraph (c)(2)(ii) of this section, but may not disregard plan provisions described in § 1.401(a)(4)–3(f)(3) that provide for increases in an employee's accrued benefit because the employee has delayed commencement of benefits after normal retirement age.

(3) *Safe harbor testing method for cash balance plans*—(i) *General rule.* A cash balance plan is a defined benefit plan that defines benefits for each employee by reference to the employee's hypothetical account. An employee's hypothetical account is determined by reference to hypothetical allocations and interest adjustments that are analagous to actual allocations of contributions and earnings to an employee's account under a defined contribution plan. Because a cash balance plan is a defined benefit plan, whether it satisfies section 401(a)(4) with respect to the equivalent amount of contributions is generally determined under paragraphs (c)(1) and (c)(2) of this section. However, a cash balance plan that satisfies each of the requirements in paragraphs (c)(3)(ii) through (xi) of this section is deemed to satisfy section 401(a)(4) with respect to an equivalent amount of contributions.

(ii) *Plan requirements in general.* The plan must be an accumulation plan. The benefit formula under the plan must provide for hypothetical allocations for each employee in the plan that satisfy paragraph (c)(3)(iii) of this section, and interest adjustments to these hypothetical allocations that satisfy paragraph (c)(3)(iv) of this section. The benefit formula under the plan must provide that these hypothetical allocations and interest adjustments are accumulated as a hypothetical account for each employee, determined in accordance with paragraph (c)(3)(v) of this section. The plan must provide that an employee's accrued benefit under the plan as of any date is an annuity that is the actuarial equivalent of the employee's projected hypothetical account as of normal retirement age, determined in accordance with paragraph (c)(3)(vi) of this section. In

addition, the plan must satisfy paragraphs (c)(3) (vii) through (xi) of this section (to the extent applicable) regarding optional forms of benefit, past service credits, post-normal retirement age benefits, certain uniformity requirements, and changes in the plan's benefit formula, respectively.

(iii) *Hypothetical allocations*— (A) *In general.* The hypothetical allocations provided under the plan's benefit formula must satisfy either paragraph (c)(3)(iii) (B) or (C) of this section. Paragraph (c)(3)(iii)(B) of this section provides a design-based safe harbor that does not require the annual comparison of hypothetical allocations under the plan. Paragraph (c)(3)(iii)(C) of this section requires the annual comparison of hypothetical allocations.

(B) *Uniform hypothetical allocation formula.* To satisfy this paragraph (c)(3)(iii)(B), the plan's benefit formula must provide for hypothetical allocations for all employees in the plan for all plan years of amounts that would satisfy § 401(a)(4)–2(b)(3) for each such plan year if the hypothetical allocations were the only allocations under a defined contribution plan for the employees for those plan years. Thus, the plan's benefit formula must provide for hypothetical allocations for all employees in the plan for all plan years that are the same percentage of plan year compensation or the same dollar amount. In determining whether the hypothetical allocations satisfy § 1.401(a)(4)–2(b)(3), the only provisions of § 1.401(a)(4)–2(b)(5) that apply are § 1.401(a)(4)–2(b)(5)(ii) (section 401(l) permitted disparity, (iii) (entry dates), (vi) (certain limits on allocations), and (vii) (dollar allocation per uniform unit of service). Thus, for example, the plan's benefit formula may take permitted disparity into account in a manner allowed under § 1.401(l)–2 for defined contribution plans.

(C) *Modified general test.* To satisfy this paragraph (c)(3)(iii)(C), the plan's benefit formula must provide for hypothetical allocations for all employees in the plan for the plan year that would satisfy the general test in § 1.401(a)(4)–2(c) for the plan year, if the hypothetical allocations were the only allocations for the employees taken into account under § 1.401(a)(4)–2(c)(2)(ii) under a defined contribution plan for the plan year. In determining whether the hypothetical allocations satisfy § 1.401(a)(4)–2(c), the provisions of § 1.401(a)(4)–2(c)(2) (iii) through (v) apply. Thus, for example, permitted disparity may be imputed under § 1.401(a)(4)–2(c)(2)(iv) in accordance with the rules of § 1.401(a)(4)–7(b) applicable to defined contribution plans.

(iv) *Interest adjustments to hypothetical allocations*—(A) *General rule.* The plan benefit formula must provide that the dollar amount of the hypothetical allocation for each employee for a plan year is automatically adjusted using an interest rate that satisfies paragraph (c)(3)(iv)(B) of this section, compounded no less frequently than annually, for the period that begins with a date in the plan year and that ends at normal retirement age. This requirement is not satisfied if any portion of the interest adjustments to a hypothetical allocation are contingent on the employee's satisfaction of any requirement. Thus, for example, the interest adjustments to a hypothetical allocation must be provided through normal retirement age, even though the employee terminates employment or commences benefits before that age.

(B) *Requirements with respect to interest rates.* The interest rate must be a single interest rate specified in the plan that is the same for all employees in the plan for all plan years. The interest rate must be either a standard interest rate or a variable interest rate. If the interest rate is a variable interest rate, it must satisfy paragraph (c)(3)(iv)(C) of this section.

(C) *Variable interest rates*—(*1*) *General rule.* The plan must specify the variable interest rate, the method for determining the current value of the variable interest rate, and the period (not to exceed 1 year) for which the current value of the variable interest rate applies. Permissible variable interest rates are listed in paragraph (c)(3)(iv)(C)(*2*) of this section. Permissible methods for determining the current value of the variable interest rate are provided in paragraph (c)(3)(iv)(C)(*3*) of this section.

(*2*) *Permissible variable interest rates.* The variable interest rate specified in the plan must be one of the following—

(*i*) The rate on 3-month Treasury Bills,

(*ii*) The rate on 6-month Treasury Bills,

(*iii*) The rate on 1-year Treasury Bills,

(*iv*) The yield on 1-year Treasury Constant Maturities,

(*v*) The yield on 2-year Treasury Constant Maturities,

(*vi*) The yield on 5-year Treasury Constant Maturities,

(*vii*) The yield on 10-year Treasury Constant Maturities,

(*viii*) The yield on 30-year Treasury Constant Maturities, or

(*ix*) The single interest rate such that, as of a single age specified in the plan, the actuarial present value of a deferred straight life annuity of an amount commencing at the normal retirement age under the plan, calculated using that interest rate and a standard mortality table but assuming no mortality before normal retirement age, is equal to the actuarial present value, as of the single age specified in the plan, of the same annuity calculated using the section 417(e) rates applicable to distributions in excess of $25,000 (determined under § 1.417(e)–1(d)), and the same mortality assumptions.

(*3*) *Current value of variable interest rate.* The current value of the variable interest rate that applies for a period must be either the value of the variable interest rate determined as of a specified date in the period or the immediately preceding period, or the average of the values of the variable interest rate as of two or more specified dates during the current period or the immediately preceding period. The value as of a date of the rate on a Treasury Bill is the average auction rate for the week or month in which the date falls, as reported in the Federal Reserve Bulletin. The value as of a date of the yield on a Treasury Constant Maturity is the average yield for the week, month, or year in which the date falls, as reported in the Federal Reserve Bulletin. [The Federal Reserve Bulletin is published by the Board of Governors of the Federal Reserve System and is available from Publication Services, Mail Stop 138, Board of Governors of the Federal Reserve System, Washington DC 20551.) The plan may limit the current value of the variable interest rate to a maximum (not less than the highest standard interest rate), or a minimum (not more than the lowest standard interest rate), or both.

(v) *Hypothetical account*—(A) *Current value of hypothetical account.* As of any date, the current value of an employee's hypothetical account must equal the sum of all hypothetical allocations and the respective interest adjustments to each such hypothetical allocation provided through the date for the employee under the plan's benefit formula (without regard to any interest adjustments provided under the plan's benefit formula for periods after that date).

(B) *Value of hypothetical account as of normal retirement age.* Under paragraph (c)(3)(vi) of this section, the value of an employee's hypothetical account must be determined as of normal retirement age in order to determine the employee's accrued benefit as of any date at or before normal retirement age. As of any date at or before normal retirement age, the

value of an employee's hypothetical account as of normal retirement age must equal the sum of each hypothetical allocation provided through that date for the employee under the plan's benefit formula, plus the interest adjustments provided through normal retirement age on each of those hypothetical allocations for the employee under the plan's benefit formula (without regard to any hypothetical allocations that might be provided after that date under the plan's benefit formula). If the interest rate specified in the plan is a variable interest rate, the plan must specify that the determination in the preceding sentence is made by assuming that the current value of the variable interest rate for all future periods is either the current value of the variable interest rate for the current period or the average of the current values of the variable interest rate for the current period and one or more periods immediately preceding the current period (not to exceed 5 years in the aggregate).

(vi) *Determination of accrued benefit*—(A) *Definition of accrued benefit.* The plan must provide that at any date at or before normal retirmeent age the accrued benefit (within the meaning of section 411(a)(7)(A)(i)) of each employee in the plan is an annuity commencing at normal retirement age that is the actuarial equivalent of the employee's hypothetical account as of normal retirement age (as determined under paragraph (c)(3)(v)(B) of this section). The separate benefit that each employee accrues for a plan year is an annuity that is the actuarial equivalent of the employee's hypothetical allocation for that plan year, including the automatic adjustments for interest through normal retirement age required under paragraph (c)(3)(iv) of this section.

(B) *Normal form of benefit.* The annuity specified in paragraph (c)(3)(vi)(A) of this section must provide an annual benefit payable in the same form at the same uniform normal retirement age for all employees in the plan. The annual benefit must be the normal retirement benefit under the plan (within the meaning of section 411(a)(9)) under the plan.

(C) *Determination of actuarial equivalence.* For purposes of this paragraph (c)(3)(vi) and paragraph (c)(3)(ix) of this section, actuarial equivalence must be determined using a standard mortality table and either a standard interest rate or the interest rate specified in the plan for making interest adjustments to hypothetical allocations. If the interest rate used is the interest rate specified in the plan, and that rate is a variable interest rate, the assumed value of the variable interest rate for all future periods must be the same value that would be assumed for purposes of paragraph (c)(3)(v)(B) of this section. The same actuarial assumptions must be used for all employees in the plan.

(D) *Effect of section 415 and 416 requirements.* A plan does not fail to satisfy this paragraph (c)(3)(vi) merely because the accrued benefits under the plan are limited by section 415, or merely because the accrued benefits under the plan are the greater of the accrued benefits otherwise determined under the plan and the minimum benefit described in section 416(c)(1) (regardless of whether the plan is top-heavy).

(vii) *Optional forms of benefit*—(A) *In general.* The plan must satisfy the uniform subsidies requirement of § 1.401(a)(4)–3(b)(2)(iv) with respect to all subsidized optional forms of benefit.

(B) *Limitation on subsidies.* Unless hypothetical allocations are determined under a uniform hypothetical allocation formula that satisfies paragraph (c)(3)(iii)(B) of this section, the actuarial present value of any QJSA provided under the plan must not be greater than the single sum distribution to the employee that would satisfy paragraph (c)(3)(vii)(C) of this section assuming that it was distributed to the employee on the date of commencement of the QJSA.

(C) *Distributions subject to section 417(e).* Except as otherwise required under section 415(b), if the plan provides for a distribution alternative that is subject to the interest rate restrictions under section 417(e), the actuarial present value of the benefit paid to an employee under the distribution alternative must equal the nonforfeitable percentage (determined under the plan's vesting schedule) of the greater of the following two amounts—

(*1*) The current value of the employee's hypothetical account as of the date the distribution commences, calculated in accordance with paragraph (c)(3)(v)(A) of this section.

(*2*) The actuarial present value (calculated in accordance with § 1.417(e)–1(d)) of the employee's accrued benefit.

(D) *Determination of actuarial present value.* For purposes of this paragraph (c)(3)(vii), actuarial present value must be determined using a reasonable interest rate and mortality table. A standard interest rate and a standard mortality table are considered reasonable for this purpose.

(viii) *Past service credit.* The benefit formula under the plan may not provide for hypothetical allocations in the curent plan year that are attributable to years of service before the current plan year, unless each of the following requirements is satisfied—

(A) The years of past service credit are granted on a uniform basis to all current employees in the plan.

(B) Hypothetical allocations for the current plan year are determined under a uniform hypothetical allocation formula that satisfies paragraph (c)(3)(iii)(B) of this section.

(C) The hypothetical allocations attributable to the years of past service would have satisfied the uniform hypothetical allocation formula requirement of paragraph (c)(3)(iii)(B) of this section, and the interest adjustments to those hypothetical allocations would have satisfied paragraph (c)(3)(iv)(A) of this section, if the plan provision granting past service had been in effect for the entire period for which years of past service are granted to any employee. In order to satisfy this requirement, the hypothetical allocation attributable to a year of past service must be adjusted for interest in accordance with paragraph (c)(3)(iv) of this section for the period (including the retroactive period) beginning with the year of past service to which the hypothetical allocation is attributable and ending at normal retirement age. If the interest rate specified in the plan is a variable interest rate, the interest adjustments for the period prior to the current plan year either must be based on the current value of the variable interest rate for the period in which the grant of past service first becomes effective or must be reconstructed based on the then current value of the variable interest rate that would have applied during each prior period.

(ix) *Employees beyond normal retirement age.* In the case of an employee who commences receipt of benefits after normal retirement age, the plan must provide that interest adjustments continue to be made to an employee's hypothetical account until the employee's benefit commencement date. In the case of an employee described in the previous sentence, the employee's accrued benefit is defined as an annuity that is the actuarial equivalent of the employee's hypothetical account determined in accordance with paragraph (c)(3)(v)(A) of this section as of the date of benefit commencement.

(x) *Additional uniformity requirements.* In addition to any uniformity requirements provided elsewhere in this paragraph (c)(3), the plan must satisfy the uniformity

requirements in § 1.401(a)(4)–3(b)(2)(v) (uniform vesting and service requirements) and (vi) (no employee contributions). A plan does not fail to satisfy the uniformity requirements of this paragraph (c)(3)(x) or any other uniformity requirement provided in this paragraph (c)(3) merely because the plan contains one or more of the provisions described in § 1.401(a)(4)–3(b)(8)(iv) (prior vesting schedules), (v) (certain conditions on accruals), or (x) (multiple definitions of service).

(xi) *Changes in benefit formula, allocation formula, or interest rates.* A plan does not fail to satisfy this paragraph (c)(3) merely because the plan is amended to change the benefit formula, hypothetical allocation formula, or the interest rate used to adjust hypothetical allocations for plan years after a fresh-start date, provided that the accrued benefits for plan years beginning after the fresh-start date are determined in accordance with § 1.401(a)(4)–13(c), as modified by § 1.401(a)(4)–13(f).

(d) *Safe harbor testing method for defined benefit plans that are part of a floor-offset arrangement*—(1) *General rule.* A floor-offset arrangement is an arrangement pursuant to which benefits under a defined benefit plan are reduced by reference to an employee's account balance under a defined contribution plan. Generally, a defined benefit plan that is part of a floor-offset arrangement satisfies the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2) only if the amount of the net benefit provided under the plan (i.e., the nominal benefit minus the offset) can be shown to be nondiscriminatory on either a contributions or a benefits basis. A defined benefit plan that is part of a floor-offset arrangement is deemed to satisfy the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2), however, if—

(i) Pursuant to the floor-offset arrangement, the vested portion of the accrued benefit (as defined in section 411(a)(7)(A)(i)) that would otherwise be provided to an employee under the defined benefit plan is reduced solely by the actuarial equivalent of all or part of the vested portion of the employee's account balance attributable to employer contributions under a defined contribution plan maintained by the same employer (plus the actuarial equivalent of all or part of any prior distributions from that portion of the account balance). In determining the actuarial equivalent of amounts provided under the defined contribution plan, an interest rate no higher than the highest standard interest rate must be used, and no mortality may be assumed in determining the actuarial equivalent of any prior distributions from the defined contribution plan or for periods prior to the benefit commencement date under the defined benefit plan.

(ii) The defined benefit plan is not a contributory DB plan (unless it satisfies § 1.401(a)(4)–6(b)(6) (the cessation-of-employee-contributions method)), and benefits under the defined benefit plan are not reduced by any portion of the employee's account balance under the defined contribution plan (or prior distributions from that account) that are attributable to employee contributions.

(iii) The defined benefit plan and the defined contribution plan benefit the same employees.

(iv) The offset under the defined benefit plan is applied to all employees in the plan on the same terms. Thus, for example, uniform interest and other actuarial assumptions must be used.

(v) All employees have available to them under the defined contribution plan the same investment options and the same options with respect to the timing of preretirement distributions.

(vi) The defined benefit plan satisfies the uniformity requirements of § 1.401(a)(4)–3(b)(2) and the unit credit safe harbor in § 1.401(a)(4)–3(b)(3) without taking into account the offset described in paragraph (d)(1)(i) of this section, and the defined contribution plan satisfies any of the tests in § 1.401(a)(4)–2 (b) or (c). Alternatively, the defined benefit plan satisfies any of the tests in § 1.401(a)(4)–3 (b) or (c) without taking into account the offset described in paragraph (d)(1)(i) of this section, and the defined contribution plan satisfies the uniform allocation safe harbor in § 1.401(a)(4)–2(b)(3) (including the uniformity requirements of § 1.401(a)(4)–2(b)(2)).

(vii) The defined contribution plan is not an ESOP, a section 401(k) plan, or a section 401(m) plan.

(2) *Application of safe harbor testing method to qualified offset arrangements.* A defined benefit plan that is part of a qualified offset arrangement as defined in section 1116(f)(5) of the Tax Reform Act of 1986, Public Law No. 99–514, is deemed to satisfy the requirements of paragraphs (d)(1)(vi) and (d)(1)(vii) of this section, if the only defined contribution plans included in the qualified offset arrangement are section 401(k) plans, section 401(m) plans, or both, and the defined benefit plan would satisfy the requirements of paragraph (d)(1)(vi) of this section assuming the elective contributions for each employee under the defined contribution plan were the same (either as a dollar amount or as a percentage of compensation) for all plan years since the establishment of the plan.

§ 1.401(a)(4)–9 Plan aggregation and restructuring.

(a) *Introduction.* Two or more plans that are permissively aggregated and treated as a single plan for purposes of the ratio percentage test of § 1.410(b)–2(b)(2) or the nondiscriminatory classification test of § 1.410(b)–4 must also be treated as a single plan for purposes of section 401(a)(4). See § 1.401(a)(4)–12 (definition of plan). Thus, for example, if an employee benefits under each of two defined benefit plans that have been aggregated and treated as a single plan for purposes of the ratio percentage test of § 1.410(b)–2(b)(2), the employee's benefits under both plans must be taken into account in determining the employee's normal and most valuable accrual rates for purposes of the general test in § 1.401(a)(3)–3(c)(1). In some cases, an aggregated plan may consist of one or more defined benefit plans and one or more defined contribution plans. Such aggregated plans are referred to in this section as DB/DC plans. Paragraph (b) of this section provides special rules for determining whether a DB/DC plan satisfies section 401(a)(4) with respect to the amount of employer-provided benefits and the availability of benefits, rights and features. Paragraph (c) of this section provides rules allowing a plan to be treated as consisting of separate component plans and allowing the component plans to be tested separately under section 401(a)(4).

(b) *Application of nondiscrimination requirements to DB/DC plans*—(1) *General rule.* Except as provided in paragraphs (b)(2) and (b)(3) of this section, whether a DB/DC plan satisfies section 401(a)(4) is determined using the same rules applicable to a single plan.

(2) *Special rules for demonstrating nondiscrimination in amount of contributions or benefits*—(i) *Application of general tests.* Because a DB/DC plan contains both a defined benefit and a defined contribution plan, it cannot rely on any of the design-based safe harbors or optional testing methods provided in § 1.401(a)(4)–2, 1.401(a)(4)–3, or 1.401(a)(4)–8. Furthermore, because a DB/DC plan contains a defined benefit plan, it must be tested on the basis of employees' aggregate normal as well as most valuable allocation or accrual rates, unless all of the defined benefit plans in the DB/DC plan satisfy the requirements to use the alternative test in § 1.401(a)(4)–3(c)(2). Thus, a DB/DC plan satisfies section 401(a)(4) with

respect to the amount of contributions or benefits only if it satisfies § 1.401(a)(4)–8(c)(1) with respect to the aggregate normal and most valuable allocation rates of the employees in the plan, or if it satisfies § 1.401(a)(4)–3(c)(1) (or § 1.401(a)(4)–3(c)(2), if applicable) with respect to the aggregate normal and most valuable accrual rates of the employees in the plan. Paragraph (b)(2)(ii) of this section provides the exclusive rules for determining employees' aggregate normal and most valuable allocation rates under a DB/DC plan. Paragraph (b)(2)(iii) of this section provides the exclusive rules for determining employees' aggregate normal and most valuable accrual rates under a DB/DC plan. Paragraphs (b)(2)(iv) and (b)(2)(v) of this section provide additional special rules applicable in determining whether a DB/DC plan satisfies section 401(a)(4) with respect to the amount of contributions or benefits.

(ii) *Determination of aggregate allocation rates.* An employee's aggregate normal allocation rate for a plan year under a DB/DC plan is the sum of the employee's allocation rate for the plan year under all defined contribution plans included in the DB/DC plan, determined under § 1.401(a)(4)–2(c)(2) by treating the defined contribution plans as a single plan, and the employee's equivalent normal allocation rate for the plan year under all defined benefit plans included in the DB/DC plan, determined under § 1.401(a)(4)–8(c)(2)(i) by treating the defined benefit plans as a single plan. An employee's aggregate most valuable allocation rate for the plan year under the DB/DC plan is the sum of the employee's allocation rate for the plan year under all defined contribution plans included in the DB/DC plan, determined under § 1.401(a)(4)–2(c)(2) by treating the defined contribution plans as a single plan, and the employee's equivalent most valuable allocation rate for the plan year under all defined benefit plans included in the DB/DC plan, determined under § 1.401(a)(4)–8(c)(2)(ii) by treating the defined benefit plans as a single plan.

(iii) *Determination of aggregate accrual rates*—(A) *Annual method.* If the annual method is used, an employee's aggregate normal accrual rate for a plan year under a DB/DC plan is the sum of the employee's normal accrual rate for the plan year under all defined benefit plans included in the DB/DC plan, determined under the annual method of § 1.401(a)(4)–3(d)(2)(i) by treating the defined benefit plans as a single plan, and the employee's equivalent normal accrual rate for the plan year under all defined contribution plans included in the DB/DC plan, determined under the annual method of § 1.401(a0(4)–8(b)(2)(i) by treating the defined contribution plans as a single plan. An employee's aggregate most valuable accrual rate for the plan year under the DB/DC plan is the sum of the employee's most valuable accrual rate for the plan year under all defined benefit plans included in the DB/DC plan, determined under the annual method of § 1.401(a)(4)–3(d)(2)(ii) by treating the defined benefit plans as a single plan, and the employee's equivalent most valuable accrual rate for the plan year under all defined contribution plans included in the DB/DC plan, determined under the annual method of § 1.401(a)(4)–8(b)(2)(i) by treating the defined contribution plans as a single plan.

(B) *Accrued-to-date method.* If the accrued-to-date method is used, an employee's aggregate normal accrual rate for a plan year under a DB/DC plan is the sum of the employee's normal accrual rate for the plan year under all defined benefit plans included in the DB/DC plan, determined under the accrued-to-date method of § 1.401(a)(4)–3(d)(3)(i) by treating the defined benefit plans as a single plan, and the employee's equivalent normal accrual rate for the plan year under all defined contribution plans included in the DB/DC plan, determined under the accrued-to-date method of § 1.401(a)(4)–8(b)(2)(ii) by treating the defined contribution plans as a single plan. An employee's aggregate most valuable accrual rate for the plan year under the DB/DC plan is the sum of the employee's most valuable accrual rate for the plan year under all defined benefit plans included in the DB/DC plan, determined under the accrued-to-date method of § 1.401(a)(4)–3(d)(3)(ii) by treating the defined benefit plans as a single plan, and the employee's equivalent most valuable accrual rate for the plan year under all defined contribution plans included in the DB/DC plan, determined under the accrued-to-date method of § 1.401(a)(4)–8(b)(2)(ii) by treating the defined contribution plans as a single plan.

(C) *Projected method.* Neither the projected method in § 1.401(a)(4)–3(d)(4) nor the fresh-start alternative for the projected method in § 1.401(a)(4)–3(d)(6)(viii) may be used to determine aggregate accrual or allocation rates under a DB/DC plan.

(iv) *Treatment of permitted disparity.* A DB/DC plan may impute permitted disparity under the rules of § 1.401(a)(4)–7 only after calculating employees' aggregate accrual or equivalent allocation rates under paragraphs (b)(2) (ii) or (iii) of this section. in the case of a DB/DC plan being tested on a benefits basis, the rules of § 1.401(a)(4)–7(c) must be applied. Thus, each employee's aggregate normal and most valuable accrual rates determined in paragraph (b)(2)(iii) of this section must be substituted respectively for the employee's unadjusted accrual rate as defined in § 1.401(a)(4)–7(c)(4)(vi). In the case of a DB/DC plan being tested on the basis of equivalent contributions, the rules of § 1.401(a)(4)–7(b) must be applied. Thus, each employee's aggregate normal and most valuable allocation rates determined in paragraph (b)(2)(ii) of this section must be substituted respectively for the employee's unadjusted allocation rate as defined in § 1.401(a)(4)–7(b)(4)(iv).

(v) *Consistency requirements*—(A) *In general.* Notwithstanding the fact that aggregate normal and most valuable accrual and allocation rates under a DB/DC plan must be separately determined with respect to the defined benefit plans and defined contribution plans in the DB/DC plan, each separately-determined rate must be determined on a consistent basis as if the DB/DC plan were a single plan. Thus, for example, the same definition of testing compensation and the same actuarial assumptions must be used.

(B) *Use of optional calculation methods.* Except as otherwise provided in this paragraph (b), any optional methods for determining allocation or accrual rates that would be available to a single plan may generally be used in determining allocation or accrual rates under a DB/DC plan, provided that the optional methods selected are applied on a consistent basis to all employees in the DB/DC plan. Examples of options that may be used on a consistent basis under this rule include alternative methods of determining testing compensation under § 1.401(a)(4)–3(e) or plan year compensation under § 1.401(a)(4)–12, and options to determine accrual or equivalent accrual rates based on benefits accrued or allocations made for plan years after a fresh-start date as provided in § 1.401(a)(4)–3(d)(6)(vii) or 1.401(a)(4)–8(b)(2)(ii)(B). Options that may not be used in testing a defined benefit plan on the basis of equivalent contributions under § 1.401(a)(4)–8 may not be used in testing a DB/DC plan, however, regardless of whether the plan is being tested on a contributions or benefits basis. Thus, for example, a DB/DC plan may not use any actuarial assumptions

available under § 1.401(a)(4)-3(d)(5)(iii)(B) other than a standard interest rate and a standard mortality table, may not disregard plan provisions providing for actuarial increases after normal retirement age under § 1.401(a)(4)-3(f)(3), and may not compute benefits other than on a plan-year basis under § 1.401(a)(4)-3(f)(6). Further, a DB/DC plan must determine the amount of employer-provided benefits using the rules in § 1.401(a)(4)-6(b)(1) (section 411(c) method), (b)(5) (government plan method) or (b)(6) (cerration-of-employee-contributions method). In addition, if a DB/DC plan is using one of the fresh-start options in § 1.401(a)(4)-3(d)(6) (vii) or (viii), the method provided in § 1.401(a)(4)-13(d) for adjusting an employee's frozen accrued benefit is not available under the plan.

(3) *Special rules for demonstrating nondiscrimination in availability of non-core benefits, rights, and features*—(i) *In general.* Non-core benefits, rights, and features provided under a DB/DC plan are permitted to satisfy the nondiscriminatory availability requirements of § 1.401(a)(4)-4 under the special rules in this paragraph (b)(3). For this purpose, non-core benefits, rights and features are benefits, rights, and features other than single sum benefits, loans, ancillary benefits, and benefit commencement dates (including the availability of in-service withdrawals).

(ii) *Current availability.* A DB/DC plan satisfies § 1.401(a)(4)-4(b)(1) with respect to the current availability of non-core benefits, rights, and features if—

(A) Each of the non-core benefits, rights, and features that is currently available to any highly compensated employee under any defined contribution plan included in the DB/DC plan is also currently available either to a group of employees that satisfies the ratio percentage test of § 1.410(b)-2(b)(2) or the nondiscriminatory classification test of § 1.410(b)-4 (without regard to the average benefit percentage test in § 1.410(b)-5), or to all nonhighly compensated employees in all defined contribution plans included in the DB/DC plan; and

(B) Each of the non-core benefits, rights, and features that is currently available to any highly compensated employee under any defined benefit plan included in the DB/DC plan is also currently available either to a group of employees that satisfies the ratio percentage test of § 1.410(b)-2(b)(2) or the nondiscriminatory classification test of § 1.410(b)-4 (without regard to the average benefit percentage test in § 1.410(b)-5), or to all nonhighly compensated employees in all defined benefit plans included in the DB/DC plan.

(iii) *Effective availability.* The fact that a non-core benefit, right, or feature is provided under one type of plan included in a DB/DC plan (i.e., defined benefit or defined contribution), and therefore may be difficult or impossible to provide under the other type of plan included in the DB/DC plan, is one of the facts that is considered in determining whether the plan satisfies the effective availability requirement of § 1.401(a)(4)-4(c)(1).

(c) *Plan restructuring*—(1) *General rule.* A plan may be treated, in accordance with this paragraph (c), as consisting of two or more component plans for purposes of determining whether the plan satisfies section 401(a)(4). If each of the component plans of a plan satisfies all of the requirements of sections 401(a)(4) and 410(b) as if it were a separate plan, then the plan is treated as satisfying section 401(a)(4). Paragraph (c)(2) of this section describes how component plans are identified. Paragraphs (c)(3) and (c)(4) of this section provide special rules for determining whether a component plan satisfies sections 401(a)(4) and 410(b), respectively. Additional rules and examples are contained in paragraphs (c)(5) and (c)(6) of this section, respectively.

(2) *Identification of component plans.* A plan may be restructured into component plans, each consisting of all the allocations, accruals, and other benefits, rights, and features provided to a selected group of employees in the plan. Any criteria may be used to select the group of employees used for this purpose, and these criteria may be changed from plan year to plan year. Thus, for example, employees may be grouped together based on employment at the same work site, in the same job category, for the same division or subsidiary, or for a unit acquired in a specific merger or acquisition, employment for the same number of years, compensation under the same method (e.g., salaried or hourly), coverage under the same allocation or benefit formula, or any other attribute or method of classification, regardless of whether the classification would be considered reasonable under the nondiscriminatory classification test of § 1.410(b)-4. Every employee in the plan must be included in one and only one component plan under the same plan for a plan year.

(3) *Satisfaction of section 401(a)(4) by a component plan*—(i) *General rule.* The rules applicable in determining whether a component plan satisfies section 401(a)(4) are the same as those applicable to a plan. Thus, for this purpose, any reference to a "plan" in section 401(a)(4) and the regulations thereunder (other than this paragraph (c)) is interpreted as a reference to a "component plan." For example, any rules relevant to the determination of allocation or accrual rates for testing purposes, including the rules for determining an employee's normal and most valuable accrual rates in § 1.401(a)(4)-3(d), the grouping rules in §§ 1.401(a)(4)-2(c)(5) and 1.401(a)(4)-3(d)(6)(iv), and the cross-testing rules in § 1.401(a)(4)-8, are applied only after restructuring. Whether a component plan satisfies the uniformity and other requirements applicable to safe harbor plans under §§ 1.401(a)(4)-2(b) and § 1.401(a)(4)-3(b) is determined taking into account the entire benefit formula and any other plan provisions actually or potentially applicable to employees in a component plan, regardless of whether all of these provisions actually apply to the employees in the component plan for the current plan year (e.g., in the case of a component plan covering only short-service employees under a benefit formula providing higher accrual rates for employees with longer service).

(ii) *Certain testing rules involving averaging.* The safe harbor in § 1.401(a)(4)-2(b)(4) for plans with uniform points allocation formulas, and the special nondiscrimination tests in sections 401(k)(3) and 401(m)(2) for elective, employee, and matching contributions, are not available in testing contributions under a component plan. Thus, for example, elective contributions under a cash or deferred arrangement may not be tested under section 401(k)(3) if the plan of which it is a part is restructured into component plans. Under § 1.401(k)-1(a)(4)(i), a cash or deferred arrangement that does not satisfy section 401(k)(3) is not a qualified cash or deferred arrangement. See also § 1.401(k)-1(b)(3)(iii). Further, since section 401(m)(2) provides the exclusive means for a plan to satisfy section 401(a)(4) with respect to the amount of employee contributions allocated to separate accounts and matching contributions, a plan that is restructured into component plans cannot satisfy section 401(a)(4) if such contributions are made to it.

(4) *Satisfaction of section 410(b) by a component plan*—(i) *General rule.* The rules applicable in determining whether a component plan satisfies section 410(b) are the same as those applicable to a plan, with the following modifications—

(A) The permissive aggregation rules of § 1.410(b)–7(d) are not available to a component plan. Thus, for example, two or more component plans may not be permissively aggregated for purposes of section 401(a)(4), or for purposes of the ratio percentage test of § 1.410(b)–2(b)(2) or the nondiscriminatory classification test of § 1.410(b)–4, even though they may be formed from a plan that consists of two or more plans that were permissively aggregated under § 1.410(b)–7(d).

(B) A component plan satisfies the average benefit percentage test of § 1.410(b)–5 if the plan of which it is a part satisfies § 1.410(b)–5 (applied without regard to § 1.410(b)–5(f)). In the case of a component plan that is part of a plan that relies on § 1.410(b)–5(f) to satisfy the average benefit percentage test, the component plan satisfies the average benefit percentage test (if applicable) only if the component plan separately satisfies § 1.410(b)–5(f)).

(ii) *Relationship to satisfaction of section 410(b) by the plan.* Satisfaction of section 410(b) by a component plan is relevant solely for purposes of determining whether the plan of which it is a part satisfies section 401(a)(4). The plan must still independently satisfy section 410(b) in order to be a qualified plan. Similarly, satisfaction of section 410(b) by a plan is relevant solely for purposes of determining whether the plan satisfies section 410(b). Thus, for example, a component plan that does not satisfy the ratio percentage test of § 1.410(b)–2(b)(2) must still satisfy the average benefit test of § 1.410(b)–2(b)(3) (including the nondiscriminatory classification test of § 1.410(b)–4 and the average benefit percentage test of § 1.410(b)–5), even though the plan of which it is a part satisfies the ratio percentage test.

(5) *Effect of restructuring under other sections.* The restructuring rules provided in this paragraph (c) apply solely for purposes of sections 401(a)(4) and 401(l), and those portions of sections 410(b), 414(s), and any other provisions that are specifically applicable in determining whether the requirements of section 401(a)(4) are satisfied. Thus, for example, a component plan is not treated as a separate plan under section 401(a)(26).

(6) *Examples.* The following examples illustrate the rules of this paragraph (c).

Example 1. Employer X maintains a defined benefit plan. The plan provides a normal retirement benefit equal to 1 percent of average annual compensation times years of service to employees at Plant M, and 1.5 percent of average annual compensation times years of service to employees at Plant N. Under paragraph (c)(2)(i) of this section, the plan may be treated as consisting of two component defined benefit plans, one providing retirement benefits equal to 1 percent of average annual compensation times years of service to the employees at Plant M, and another providing benefits equal to 1.5 percent of average annual compensation times years of service to employees at Plant N. If each component plan satisfies sections 401(a)(4) and section 410(b) as if it were a separate plan under the rules of this paragraph (c), then the entire plan satisfies section 401(a)(4).

Example 2. The facts are the same as in *Example 1*, except that Employer X also maintains another defined benefit plan providing a normal retirement benefit equal to 2 percent of career average compensation times years of service to employees at Plant O. If the plan covering employees at Plants M and N were aggregated with the plan covering employees at Plant O under section 410(b), the aggregated plan could then be restructured into component plans. For example, the aggregated plan could be treated as consisting of two plans, one providing a normal retirement benefit equal to 1 percent of average annual compensation times years of service to employees at Plant M and 2 percent of career average compensation times years of service at Plant O, and another providing a normal retirement benefit equal to 1.5 percent of average annual compensation to employees at Plant N. If each component plan satisfied section 401(a)(4) and section 410(b) as if it were a separate plan under the rules of this paragraph (c), then the entire aggregated plan would satisfy section 401(a)(4).

Example 3. Employer Y maintains Plan P, a defined benefit plan, for its Employees A, B, C, D, E, and F. Plan P provides benefits under a uniform formula that satisfies the requirements of § 1.401(a)(4)–3(b)(2) and (b)(3) before it is amended on February 14, 1994. The amendment provides an early retirement window benefit that is a subsidized optional form of benefit under § 1.401(a)(4)–3(b)(2)(iv) and that is available on the same terms to all employees who satisfy the eligibility requirements for the window. The early retirement window benefit is available only to employees who retire between June 1, 1994, and December 31, 1994. Assume that Employees A, B, and C will be eligible to receive the window benefit by the end of the window period and Employees D, E, and F will not. Because substantially all employees in the plan will not satisfy the eligibility requirements for the early retirement window benefit by the close of the early retirement window benefit period, Plan P fails to satisfy the uniform subsidies requirement of § 1.401(a)(4)–3(b)(2)(iv). See § 1.401(a)(4)–3(b)(2)(vii), *Example 7.* Under paragraph (c)(2)(i) of this section, Employees A, B, C, D, E, and F may be grouped into two component plans, one consisting of Employees A, B, and C and all their accruals and other benefits, rights, and features under the plan (including the early retirement window benefit), and another consisting of Employees D, E, and F, and all their accruals and other benefits, rights, and features under the plan. Each of the component plans identified in this manner satisfies the uniform subsidies requirement of § 1.401(a)(4)–3(b)(2)(iv), and thus satisfies the requirements of § 1.401(a)(4)–3(b). If each of these component plans also satisfies section 410(b) (including, if applicable, the reasonable classification requirement of § 1.410(b)–4(b)) as if it were a separate plan under the rules of this paragraph (c), then the entire plan satisfies section 401(a)(4).

Example 4. Employer Z maintains Plan Q, a defined benefit plan with a benefit formula that provides 2 percent of average annual compensation for each year of service up to 20 to each employee in the plan. Assume that Plan Q would satisfy the unit credit fractional rule safe harbor in § 1.401(a)(4)–3(b)(4), except that some employees in the plan accrue a portion of their normal retirement benefit in the current plan year that is more than ⅓ larger than the portion of the same benefit accrued by other employees in the plan for the current plan year, and the plan therefore fails to satisfy the ⅓-larger requirement of § 1.401(a)(4)–3(b)(4)(i)(C). Employer Z restructures Plan Q into two plans, one covering employees with 30 years or less of service at normal retirement age, and the other covering all other employees in the plan. Each component plan would separately satisfy the ⅓-larger requirement of § 1.401(a)(4)–3(b)(4)(i)(C) if the only employees taken into account were those employees included in the component plan in the current plan year. Under paragraph (c)(3)(i) of this section, however, the component plans do not satisfy the ⅓-larger requirement, and hence fail to satisfy the unit credit fractional rule safe harbor in § 1.401(a)(4)–3(b)(4), because the safe harbor determination is made taking into account the effect of the plan benefit formula on any potential employee, and not just those employees in the component plan in the current plan year.

§ 1.401(a)(4)–10 Testing of former employees.

(a) *Introduction*—(1) *General rule.* The requirements of section 401(a)(4) with respect to the amount of contributions and benefits and the availability of benefits, rights, and features under a plan apply separately to employees and former employees. See § 1.401(a)(4)–1(c)(3). This section contains rules for applying those requirements to former employees. None of the other requirements of section 401(a)(4) applies separately to employees and former employees.

(2) *Overview.* Rules for determining whether a plan satisfies section 401(a)(4) with respect to the amount of contributions or benefits provided to former employees under the plan are set forth in paragraph (b) of this section. Rules for determining whether a plan satisfies section 401(a)(4) with respect to the availability of benefits, rights, and features provided to former employees under the plan are set forth in paragraph (c) of this section. A plan may satisfy

any of the tests in paragraphs (b) or (c) of this section on a restructured basis, pursuant to § 1.401(a)(4)–9(c).

(b) *Nondiscrimination in amount of contributions or benefits*—(1) *General rule.* A plan must separately satisfy § 1.401(a)(4)–1(b)(2) with respect to the amount of contributions or benefits provided to former employees. A plan under which no former employee currently benefits is deemed to satisfy this requirement. Whether a former employee currently benefits under a plan is determined under § 1.410(b)–3(b).

(2) *Defined contribution plans.* Because of the application of the limitations of section 415, a defined contribution plan generally cannot provide an allocation to a former employee, except under section 415(c)(3)(C) (regarding permanent and total disability). Because allocations under section 415(c)(3)(C) may not be provided to highly compensated former employees, allocations made under that section automatically satisfy § 1.401(a)(4)–1(b)(2).

(3) *Defined benefit plans*—(i) *General rule.* A defined benefit plan satisfies § 1.401(a)(4)–1(b)(2) with respect to the amount of contributions or benefits provided to former employees if the plan satisfies the unit credit safe harbor requirements of § 1.401(a)(4)–3(b)(3) (including the uniformity requirements of § 1.401(a)(4)–3(b)(2)), the general test of § 1.401(a)(4)–3(c) (using the annual method in § 1.401(a)(4)–3(d)(2) to determine accrual rates), or the general test of § 1.401(a)(4)–8(c)(1), with respect to these contributions or benefits. Only benefit accruals arising out of a former employee's status as a former employee are taken into account in determining whether these requirements are satisfied. In applying §§ 1.401(a)(4)–3 and 1.401(a)(4)–8 for purposes of this paragraph (b), the terms "highly compensated former employee" and "nonhighly compensated former employee" are substituted for the terms "highly compensated employee" and "nonhighly compensated employee" where those terms appear in those sections. Paragraphs (b)(3) (ii) through (iv) of this section provide certain special rules for applying the safe harbor tests, the general tests, and permitted disparity provisions to former employees.

(ii) *Special rules for applying safe harbor tests*—(A) *Compensation requirements.* In order to satisfy the unit credit safe harbor in § 1.401(a)(4)–3(b)(3) with respect to benefits that are determined as a percentage of average annual compensation, the average annual compensation of a former employee must be determined as of the date the individual most recently became a former employee.

(B) *Option to apply safe harbors on aggregate basis.* Notwithstanding the rules of § 1.401(a)(4)–1(c)(3) (requiring separate testing of former employees), a plan satisfies the requirements of § 1.401(a)(4)–1(b)(2) with respect to accruals provided to former employees in a plan year if the accruals provided to the former employees, when added to their previously accrued benefits (including accruals attributable to their status as employees), satisfy the unit credit safe harbor requirements of § 1.401(a)(4)–3(b)(3) (including the uniformity requirements of § 1.401(a)(4)–3(b)(2)).

(iii) *Special rules for applying general tests*—(A) *In general.* A former employee's accrual rate for purposes of the general tests of § 1.401(a)(4)–3(c) or § 1.401(a)(4)–8(c)(1) must be determined subject to the modifications described in paragraphs (b)(3)(iii) (B) through (D) of this section.

(B) *Compensation for former employees.* A former employee's testing compensation for purposes of § 1.401(a)(4)–3(d)(2), or plan year compensation for purposes of § 1.401(a)(4)–8(c)(2), is generally determined in the same manner as it would be if the former employee were an employee, except that it is determined as of the date the individual most recently became a former employee. In applying the rules for determining accrual and equivalent allocation rates in §§ 1.401(a)(4)–3(d)(2) and 1.401(a)(4)–8(c)(2), however, the modifications to plan year compensation provided in § 1.401(a)(4)–3(e)(3)(ii) (A) and (B) must be applied. In addition, an employer may use the former employee's compensation as determined under the plan as of the plan year in which the individual most recently became a former employee in lieu of the testing compensation or plan year compensation otherwise required under §§ 1.401(a)(4)–3(d)(2) and 1.401(a)(4)–8(c)(2), provided that any compensation used to determine the employee's compensation under the plan as of that plan year is section 414(s) compensation. If the option in the preceding sentence is used to determine any former employee's accrual or equivalent allocation rates for a plan year, it must be applied consistently to determine the accrual or equivalent allocation rates of all former employees in the plan for that plan year.

(C) *Testing service for former employees.* A former employee's accrual rate determined under §§ 1.401(a)(4)–3(d)(2) and 1.401(a)(4)–8(c)(2) may be adjusted by dividing the rate by the former employee's testing service (or the former employee's testing service after a fresh-start date), determined as of the date the former employee most recently became a former employee.

(D) *Special section 410(b) test for former employees.* In determining whether a rate group (within the meaning of § 1.401(a)(4)–3(c) or § 1.401(a)(4)–8(c)(1)) consisting of former employees satisfies section 410(b), the special rule in § 1.410(b)–2(c)(2)(ii) may be applied.

(iv) *Permitted disparity.* The provisions of section 401(l) and § 1.401(a)(4)–7 generally apply to benefits provided to former employees in the same manner as those provisions apply to employees. Thus, for example, for purposes of determining a former employee's cumulative permitted disparity limit, the sum of the former employee's total annual disparity fractions (within the meaning of § 1.401(l)–5) as an employee continue to be taken into account. However, the permitted disparity rate applicable to a former employee is determined under § 1.401(l)–3(e) as of the age the former employee commenced receipt of benefits, not as of the date the employee receives the accrual for the current plan year.

(4) *Safe harbor for ad hoc cost-of-living adjustments*—(i) *General rule.* A defined benefit plan satisfies section 401(a)(4) with respect to the amount of any ad hoc cost-of-living adjustment (an "ad hoc COLA") provided to former employees if the ad hoc COLA increases the benefits of each former employee in the plan on a consistent basis. For purposes of this paragraph (b)(4), an ad hoc COLA may not provide for additional increases in benefits in plan years after the plan year in which the ad hoc COLA is provided. The percentage increase in a former employee's benefits under the ad hoc COLA may not exceed the social security increase. For this purpose, "social security increase" means the percentage increase in social security benefits under section 215(i)(2)(A) of the Social Security Act for the period that begins with the date the former employee commenced receipt of benefits and that ends on the date in the current plan year on which the ad hoc COLA first applies, less the percentage increase provided to the former employee under any automatic COLA or any prior ad hoc COLA under the plan. An ad hoc COLA that exceeds the social security increase for the applicable period is tested under the general rule of paragraph (b)(1) of this section.

(ii) *Uniformity requirements.* An ad hoc COLA increases benefits on a

consistent basis for purposes of this paragraph (b)(4) if it applies the social security increase to the periodic benefit of all former employees in the plan. An ad hoc COLA may provide a percentage increase that is less than the social security increase, if the method of determining the percentage increase is consistent for all former employees in the plan, and if the ad hoc COLA provides the same percentage increase to all former employees in the plan who commenced receipt of benefits in the same calendar or plan year. Thus, for example, an employer may provide an ad hoc COLA based on any of the following percentages: the annual rate of social security increase minus a percentage point, the annual rate of social security increase capped at a given percentage, a specified percentage (less than 100 percent) of the social security increase, or a fixed percentage increase for each year in the period. Similarly, the ad hoc COLA may be limited to the social security increase otherwise allowed under this paragraph (b)(4)(ii) for the period since a date or an age specified in the plan.

(iii) *Banding options.* In determining the year in which a former employee commenced receipt of benefits for purposes of this paragraph (b)(4), former employees may be grouped into bands (not to exceed 5 consecutive calendar years each) based on the years in which the former employees in the band commenced receipt of benefits. If this option is used, all former employees in each band may be treated as if they commenced receipt of benefits in the most recent year in the band. Thus, for example, all former employees who commenced receipt of benefits under the plan in calendar years 1975–1979 may be grouped into a band, may be treated as if they had commenced receipt of benefits in 1979, and thus may be provided the same percentage increase in their benefits. In addition, the average annual rate of social security increase during the years within a band may be treated as the annual social security increase for each year within the band.

(iv) *Examples.* The following examples illustrate the safe harbors in this paragraph (b)(4). In each example, the plan does not contain an automatic COLA, and it has never before granted an ad hoc COLA for former employees.

Example 1. Plan A provides an ad hoc COLA for all former employees in the amount of 3 percent per year since commencement of benefits. The annual rate of social security increase since each year that a former employee commenced receipt of benefits was at least 3 percent. Plan A satisfies the safe harbor of this paragraph (b)(4).

Example 2. The facts are the same as in *Example 1*, except that the plan bands all former employees into 3-year bands for purposes of determining former employee's benefit commencement dates. Thus, for example, all former employees who commenced benefits 7–9 years prior to the amendment are treated as commencing benefits 7 years prior to the amendment and are then entitled to a benefit increase of 21 percent. Plan A satisfies the safe harbor of this paragraph (b)(4).

Example 3. Plan B provides an ad hoc COLA for all former employees in the following amounts: 3 percent per year for each of the first 5 years preceding the date of the amendment granting the ad hoc COLA (the "amendment date"); 6 percent per year for the sixth through tenth years preceding the amendment date; and 9 percent per year for the eleventh through fifteenth years preceding the amendment date. Thus, for example, a former employee who commenced receipt of benefits 2 years before the amendment date will receive an increase of 6 percent (3 percent × 2 years); and a former employee who commenced receipt of benefits 15 years before the amendment date will receive an increase of 90 percent ((3 percent × 5 years) + (6 percent × 5 years) + (9 percent × 5 years)). Assume that the average annual rate of social security increase during the 5 years prior to the amendment date was 3 percent, the average annual rate of social security increase during the 6–10 years prior to the amendment date was 6 percent, and the average annual rate of social security increase during the 11–15 years prior to the amendment date was 9 percent. In determining the social security increase for former employees, former employees are grouped into bands of 5 years each, and the average annual rate of social security increase for all years within the band is treated as the annual rate of social security increase for each year in the band. Because the ad hoc COLA provides for percentage increases equal to the social security increase to all former employees, Plan B satisfies the safe harbor of this paragraph (b)(4).

Example 4. The facts are the same as in *Example 3*, except that the ad hoc COLA increases benefits for all former employees in the amount of 5 percent per year since benefit commencement. Plan B does not satisfy the safe harbor of this paragraph (b)(4), because the ad hoc COLA exceeds the social security increase for those former employees who commenced receipt of benefits less than 5 years before the amendment date.

(c) *Nondiscrimination in availability of benefits, rights, or features*—(1) *General rule.* A plan satisfies section 401(a)(4) with respect to the availability of benefits, rights, and features provided to former employees if the plan satisfies § 1.401(a)(4)–4 with respect to those benefits, rights, or features. In determining whether a group of former employees to whom a benefit, right, or feature is currently available satisfies section 410(b), the safe harbor testing method in § 1.410(b)–2(c)(2)(ii) may be applied.

(2) *No change in availability.* A plan satisfies section 401(a)(4) with respect to the availability of a benefit, right, or feature provided to any former employee in the plan if no change in the availability of the benefit, right, or feature has been made that is first effective in the current plan year with respect to a former employee.

(3) *Changes in availability.* A plan satisfies section 401(a)(4) with respect to the availability of a benefit, right, or feature provided to any former employee if any change in the availability of the benefit, right, or feature that is first effective in the current plan year with respect to a former employee is made in a nondiscriminatory manner. Thus, any expansion in the availability of the benefit, right, or feature to any highly compensated former employee in the plan must be applied on a consistent basis to all nonhighly compensated former employees in the plan. Similarly, any contraction in the availability of the benefit, right, or feature that affects any nonhighly compensated former employee in the plan must be applied on a consistent basis to all highly compensated former employees in the plan.

(4) *Plan loans.* For purposes of demonstrating that a plan satisfies section 401(a)(4) with respect to the availability of loans provided to former employees, an employer may test as employees those former employees who are parties in interest within the meaning of section 3(14) of the Employee Retirement Income Security Act of 1974.

(5) *Employees terminated before a specified date.* In applying the rule of § 1.410(b)–6(h)(2) (permitting certain former employees who became former employees before 1984 or more than 10 years before the current year to be excluded) for purposes of this paragraph (c), a former employee is treated as currently benefiting under the plan only if there has been a change in the current plan year in the availability of any benefit, right, or feature provided to the former employee.

§ 1.401(a)(4)–11 Additional rules.

(a) *Introduction.* This section contains additional rules for determining whether a plan satisfies section 401(a)(4). Paragraph (b) of this section contains rules for the treatment of the portion of an employee's accrued benefit or account balance that is attributable to rollovers and transfers between plans. Paragraph (c) of this section contains rules relating to vesting. Paragraph (d) of this section contains rules relating to

crediting service. Paragraph (e) of this section, regarding family aggregation, is reserved. Paragraph (f) of this section, regarding governmental plans, is reserved. Paragraph (g) of this section provides rules regarding the extent to which retroactive amendments may be made for purposes of section 401(a).

(b) *Rollovers and transfers*—(1) *Rollovers and elective transfers.* The portion of an employee's accrued benefit or account balance that is attributable to rollover contributions described in section 402(a)(5), 403(a)(4), or 408(d)(3), or to elective transfers described in § 1.411(d)–4, Q&A–3(b), are not taken into account in determining whether the transferee plan satisfies the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2).

(2) *Other transfers.* [Reserved]

(c) *Vesting*—(1) *In general.* A plan does not satisfy the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2) if the manner in which employees vest in their accrued benefits discriminates in favor of highly compensated employees. This determination is made after taking into account any relevant provisions of sections 401(a)(5)(E), 411(d)(1), 411(d)(2), and 411(e). For purposes of this paragraph (c), the manner in which employees vest in their accrued benefits also is determined taking into account any plan provision that directly effects the nonforfeitability of employees' accrued benefits (e.g., plan provisions regarding suspension of benefits permitted under section 411(a)(3)(B)).

(2) *Deemed equivalence of statutory vesting schedules.* For purposes of this paragraph (c), when two or more plans with different vesting schedules are permissively aggregated under § 1.410(b)–7(d), the minimum vesting rates required under the vesting schedules in section 411(a)(2) (A) and (B) are treated as equivalent to one another, and the minimum vesting rates required under the vesting schedules in section 416(b)(1) (A) and (B) are treated as equivalent to one another. Thus, for example, Plan A, covering an employer's nonhighly compensated employees and providing full vesting after completion of 5 years of service, and Plan B, covering the same employer's highly compensated employees and providing graded vesting according to the schedule in section 411(a)(2)(B), do not fail to satisfy section 401(a)(4) when treated as a single plan merely because of this difference in vesting schedules.

(d) *Crediting service*—(1) *In general.* A plan does not satisfy the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2) if the manner in which employees' service is credited for any purpose under the plan discriminates in favor of highly compensated employees.

(2) *Absence from service*—(i) *General rule.* A plan does not fail to satisfy this paragraph (d) merely because it credits service during a period of absence from service if the service ("imputed service") satisfies the requirements specified in paragraph (d)(2)(ii) of this section.

(ii) *Requirements for crediting service during absence from service*—(A) *Definition of absence from service.* For the period during which imputed service is credited to an employee, the employee must be absent from service for a reason other than termination from employment with the employer maintaining the plan. For this purpose, if an employee continues to perform services for the employer during the period, the employee is not absent from service.

(B) *Uniformity.* Any provision in the plan for crediting imputed service while an employee is absent from service must be applied uniformly to all employees in the plan.

(C) *Effective availability.* For purposes of applying the effective availability requirement of § 1.401(a)(4)–4(c) to the right to imputed service credits under the plan, the manner in which the employer grants absences from service that give rise to imputed service is taken into account.

(D) *Period of credited service.* In the case of imputed service credited for a period during which an employee is absent from service for any reason other than military duty or jury duty, the maximum period for which imputed service may be credited is the shorter of 6 months or the duration of the absence. If an employee is absent from service for military duty or jury duty, imputed service may be credited to the employee for up to the entire period of the military duty or jury duty even if the period exceeds 6 months.

(E) *Amount of imputed service.* The amount of imputed service credited during a period of absence from service is not greater than the service with which the employee would reasonably have been expected to have been credited during the period if the employee had continued to perform services.

(iii) *Elapsed time.* Notwithstanding paragraphs (d)(2) (i) and (ii) of this section, if the plan is crediting service using elapsed time in accordance with § 1.410(a)–7, the amount of service credited for an employee's absence from service must not be less than the amount of service required to be credited under § 1.401(a)–7.

(e) *Family aggregation rules.* [Reserved]

(f) *Governmental plans.* [Reserved]

(g) *Retroactive correction*—(1) *In general.* Section 401(a)(4)–1(c)(9)(i) provides that the requirements for determining whether a plan satisfies section 401(a)(4) are generally applied on a plan year basis, taking into account the terms of the plan in effect and the employer's employee demographics during the plan year. Notwithstanding this requirement, this paragraph (g) provides rules for retroactively amending a plan after the close of the plan year for purposes of satisfying section 401(a) for the plan year. These rules apply in addition to the rules of section 401(b). Paragraph (g)(2) of this section describes the scope of the retroactive amendments that are permitted to be made. Paragraph (g)(3) of this section specifies the conditions under which a retroactive amendment may be made. Paragraph (g)(4) of this section provides a rule prohibiting retroactive amendments that benefit terminated nonvested employees from being taken into account for certain purposes. Paragraph (g)(5) of this section discusses the effect of the retroactive amendments permitted under this paragraph (g) under provisions other than section 401(a).

(2) *Scope of retroactive amendments*—(i) *Minimum coverage and nondiscrimination in amount of contributions or benefits.* For purposes of satisfying the minimum coverage requirements of section 410(b) or the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2), a plan may be retroactively amended to increase accruals or allocations for employees who benefited under the plan during the preceding plan year, or to grant accruals or allocations to employees who did not benefit under the plan during the preceding plan year. For purposes of this paragraph (g), the term *employee* means an individual who was an employee within the meaning of § 1.410(b)–9 in the preceding plan year.

(ii) *Nondiscriminatory availability of benefits, rights, and features.* A plan may not be retroactively amended to make available to an employee a benefit, right, or feature under the plan that previously was not available to the employee solely to meet the nondiscriminatory availability requirements of § 1.401(a)(4)–4. An employer may, however, make available to an employee a benefit, right, or feature that is directly related to an increase in the amount of an employee's accrual or allocation (including a grant of accruals or allocations to an employee who otherwise would not be treated as benefiting under the plan).

(iii) *Nondiscriminatory effect of plan amendments and terminations.* A plan may be retroactively amended to correct a discriminatory plan amendment so that the plan satisfies the requirements of § 1.401(a)(4)–5(a). A plan may not, however, be retroactively amended to correct for a failure to incorporate the pre-termination restrictions of § 1.401(a)(4)–5(b).

(iv) *Special rules for section 401(k) and 401(m) plans.* A plan may not be retroactively amended under this paragraph (g) to correct for a failure to satisfy the actual deferral percentage test of section 401(k)(3) or the actual contribution percentage test of section 401(m)(2). See §§ 1.401(k)–1(f) and 1.401(m)–1(e) for rules on correcting a violation of these tests. In addition, neither a section 401(k) plan nor a section 401(m) plan may be retroactively amended under this paragraph (g) to extend eligibility under the plan to an employee for purposes of § 1.410(b)–3(a)(2)(i) or 1.401(k)–1(b)(1)(i).

(3) *Conditions for retroactive correction*—(i) *In general.* A retroactive amendment is not permitted under this paragraph (g) unless it satisfies each of the requirements of paragraphs (g)(3) (ii) through (v) of this section.

(ii) *Allocations or accruals only increased.* The retroactive amendment may not result in a reduction to an employee's benefits (including any benefit, right, or feature) determined based on the terms of the plan in effect immediately before the amendment.

(iii) *Amendment effective for all purposes.* For purposes of determining an employee's rights and benefits under the plan, the retroactive amendment must be effective as if the amendment had been made on the first day of the preceding plan year. Thus, increases in an employee's allocations or accruals, along with the associated benefits, rights, and features, must be increased to the level at which they would have been had the amendment been in effect for the entire preceding plan year.

(iv) *Time when amendment must be adopted and put into effect*—(A) *In general.* Any retroactive amendment intended to apply to the preceding plan year must be adopted and implemented before the 15th day of the 10th month after the close of the plan year in order to be taken into account for the preceding plan year.

(B) *Determination letter requested by employer or plan administrator.* If, on or before the end of the period set forth in paragraph (g)(3)(iv)(A) of this section, the employer or plan administrator files a request pursuant to § 601.201(o) of this chapter (Statement of Procedural Rules) for a determination letter on the amendment, or the initial or continuing qualification of the plan, or the trust that is part of the plan, the period set forth in paragraph (g)(3)(iv)(A) of this section is extended in the same manner as provided for an extension of the remedial amendment period under § 1.401(b)–1(d)(3).

(v) *Retroactive amendment must separately satisfy sections 401(a)(4) and 410(b)*—(A) *General rule.* Except as provided in paragraph (g)(3)(v)(B) of this section, the additional allocations or accruals resulting from the retroactive amendment of a plan must separately satisfy section 401(a)(4) for the preceding plan year and must benefit a group of employees that separately satisfies section 410(b) for the preceding plan year. In determining whether the additional allocations or accruals resulting from the retroactive amendment benefit a group of employees that separately satisfies section 410(b), the same rules apply as in determining whether a component plan separately satisfies section 410(b) under § 1.401(a)(4)–9(c)(1)(i). Thus, for example, in applying the rules of this paragraph (g)(3)(v), an employer may not aggregate the additional accruals or allocations resulting from the retroactive amendment with the other accruals or allocations already provided under the terms of the plan as in effect during the plan year without regard to the retroactive amendment.

(B) *Retroactive amendment to conform to safe harbor.* The requirements of paragraph (g)(3)(v)(A) of this section need not be met if the retroactive amendment is for purposes of conforming the plan to one of the safe harbors in § 1.401(a)(4)–2(b) or 1.401(a)(4)–3(b) (including for purposes of applying the requirements of those safe harbors under the optional testing methods in § 1.401(a)(4)–8 (b)(3) or (c)(3)), or ensuring that the plan continues to meet one of those safe harbors.

(4) *Retroactive amendments affecting terminated nonvested employees.* A retroactive amendment is not taken into account in determining whether a plan satisfies section 401(a)(4) or 410(b) to the extent the amendment affects nonvested employees who terminated employment with the employer as of the close of the preceding year, and therefore would not have received any economic benefit from the amendment if it had been made in the prior year.

(5) *Effect under other statutory requirements.* A retroactive amendment under this paragraph (g) is effective only for purposes of section 401(a). Thus, for example, the retroactive amendment is effective not only for purposes of sections 401(a)(4) and 410(b), but also for purposes of determining whether the plan satisfies the requirements of sections 401(l) and 401(a)(26) for the preceding plan year. By contrast, the amendment is not given retroactive effect for purposes of section 404 (deductions for contributions of an employer to an employees' trust or annuity plan) or section 412 (minimum funding standards). Thus, the otherwise applicable rules for deductions and funding are not modified by the rules in this paragraph (g).

(6) *Examples.* The following examples illustrate the retroactive correction rules of this paragraph (g).

Example 1. Employer A maintains a calendar year defined benefit plan that for the 1992 plan year is tested for compliance with the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2) under the general test of § 1.401(a)(4)–3(c). In 1993, Employer A is concerned that for the 1992 plan year the plan will fail the requirement of § 1.401(a)(4)–1(b)(2). Provided that any retroactive amendment meets the requirements of paragraph (g)(2) of this section, Employer A may retroactively amend the plan to increase accruals, and those increases will be taken into account in determining whether the plan will satisfy section 401(a)(4) for the 1992 plan year as to the amount of benefits.

Example 2. Employer B maintains a calendar year defined benefit plan that in 1992, 1993, and 1994, satisfies the requirements of the alternative safe harbor for flat benefit plans in § 1.401(a)(4)–3(b)(4). In 1996, Employer B determines that the plan will not satisfy that safe harbor for the 1995 plan year because the average of the normal accrual rates for all nonhighly compensated employees is less than 70 percent of the average of the normal accrual rates for all highly compensated employees. Provided the retroactive amendment would otherwise satisfy the requirements of this paragraph (g), Employer B may retroactively amend the plan to increase the number of nonhighly compensated employees in the plan so that the amended plan satisfies the safe harbor for the 1995 plan year. The retroactive amendment need not meet the requirements of paragraph (g)(3)(v)(A) of this section because Employer B is retroactively amending the plan to conform to a safe harbor in § 1.401(a)(4)–3(b). See paragraph (g)(3)(v)(B) of this section.

Example 3. Employer C maintains a calendar year defined contribution plan covering all the employees in Division A and Division B. Under the plan, only employees in Division A have the right to direct the investments in their account. For plan years prior to 1994, the plan met the current availability requirement of § 1.401(a)(4)–4(b) because the employees in Division A were a group of employees that satisfied the nondiscriminatory classification test of § 1.410(b)–4. Because of attrition in the employee population in Division A in 1994, the group of employees to whom the right to

direct investments is available no longer meets the nondiscriminatory classification test of § 1.410(b)–4. Thus, the right to direct investments under the plan fails the current availability requirement of § 1.401(a)(4)–4(b) for 1994. In 1995, Employer C cannot retroactively amend the plan to make the right to direct investments available to a group of employees that would meet the current availability requirement of § 1.401(a)(4)–4(b).

Example 4. The facts are the same as in *Example 3.* In 1995, Employer C may amend the plan to benefit the employees in Division C as well as Divisions A and B so that the plan will meet the minimum coverage requirements of section 410(b). In increasing plan coverage, the right to direct investments may also be made available to the employees in Division C.

Example 5. Employer D maintains a defined contribution plan that covers all employees and that offsets an employee's benefit by the employee's projected primary insurance amount. The plan is not eligible to use the safe harbors under § 1.401(a)(4)–3(b) because the plan does not meet the requirements of section 401(l). Under the plan, the accrual rates for all highly compensated employees (determined under the general test of § 1.401(a)(4)–3(c)) for 1994 are less than 1.5 percent of testing compensation, and the accrual rates for all nonhighly compensated employees (determined under the general test of § 1.401(a)(4)–3(c)) for 1994 are 2 percent of testing compensation. Employer D may not retroactively increase the contributions to the highly compensated employees under the plan so that they equal that of the nonhighly compensated employees, because such a retroactive amendment would not separately satisfy sections 410(b) and 401(a)(4) if it were treated as a separate plan. This is the case even if, after taking the amendment into account, the plan would satisfy sections 410(b) and 401(a)(4) for the 1994 plan year.

Example 6. Employer E maintains two plans—Plan M and Plan N. Plan M satisfies the ratio percentage test of § 1.410(b)–2(b)(2), but Plan N does not. Thus, in order to satisfy section 410I(b), Plan N must satisfy the average benefits test of § 1.410(b)–2(b)(3). The average benefit percentage of Plan N is 60 percent. Employer E may increase the accruals under either Plan M or Plan N so that the average benefit percentage meets the 70 percent requirement of the average benefits test.

Example 7. Employer F maintains Plan O, which does not satisfy the requirements of section 401(a)(4) in a plan year. Under the terms of paragraph (g)(2) of this section, Employer F amends Plan O to increase the benefits of certain employees retroactively. In designing the amendment, Employer F identifies those employees who have terminated without vested benefits during the period after the end of the prior plan year and before the adoption date of the amendment, and the amendment provides increases in benefits primarily to those employees. It would be inconsistent with the purpose of preventing discrimination in favor of highly compensated employees for Plan O to treat the amendment as retroactively effective under this paragraph (g)(2). See § 1.401(a)(4)–1(c)(2).

Example 8. Employer G maintains both a section 401(k) plan and a section 401(m) plan that provides matching contributions at a rate of 50 percent with respect to elective contributions under the section 401(k) plan. In plan year 1995, the section 401(k) plan fails to satisfy the actual deferral percentage test of section 401(k)(3). In order to satisfy section 401(k)(3), Employer G makes corrective distributions to highly compensated employees H1 through H10 of their excess contributions as provided under § 1.401(k)–1(f). The matching contributions that H1 through H10 had received on account of their excess contributions are not forfeited, however. Thus, the effective rate of matching contributions provided to H1 through H10 is increased as a result of the corrective distributions. Since no nonhighly compensated employee in the section 401(m) plan is provided with an equivalent rate of matching contributions, the rate of matching contributions provided to H1 through H10 does not satisfy the nondiscriminatory availability requirement of § 1.401(a)(4)–4 in plan year 1995. This violation may not be corrected under this paragraph (g).

§ 1.401(a)(4)–12 Definitions.

In applying the provisions of this section and of §§ 1.401(a)(4)–1 through 1.401(a)(4)–13, the definitions in this section govern unless otherwise provided.

Accrual method. Accrual method means the method used to determine the accrued benefit (within the meaning of section 411(a)(7)(A)(i)) of employees under a defined benefit plan as of any date.

Accumulation Plan. Accumulation plan means a defined benefit plan under which the benefit of every employee in the plan for each plan year is separately determined, using plan year compensation (if benefits are determined as a percentage of compensation rather than a dollar amount) separately calculated for the plan year, and each employee's total accrued benefit as of the end of a plan year is the sum of the separately determined benefits for that plan year and all prior plan years. A plan does not fail to be an accumulation plan merely because the benefits for years of service before a fresh-start date were not determined in the manner described in the preceding sentence, provided that the accrued benefit of each employee in the plan after the fresh-start date is determined in accordance with § 1.401(a)(4)–13(c)(2) (formula without wear-away) without providing for compensation adjustments otherwise permitted under § 1.401(a)(4)–13(c)(5)(iii).

Actuarial equivalent. An amount or benefit is the *actuarial equivalent* of, or is *actuarially equivalent* to, another amount or benefit at a given time if the actuarial present value of the two amounts or benefits (calculated using the same actuarial assumptions) at that time is the same.

Actuarial present value. Actuarial present value means the value as of a specified date of an amount or series of amounts due thereafter, where each amount is—

(1) Multiplied by the probability that the condition or conditions on which payment of the amount is contingent will be satisfied, and

(2) Discounted according to an assumed rate of interest to reflect the time value of money.

Ancillary benefit. Ancillary benefit means an ancillary benefit within the meaning of § 1.401(a)(4)–4(e)(2).

Average annual compensation. Average annual compensation means average annual compensation within the meaning of § 1.401(a)(4)–3(e)(2).

Benefit formula. Benefit formula means the formula a defined benefit plan applies to determine the accrued benefit (within the meaning of section 411(a)(7)(A)(i)) in the form of an annual benefit commencing at normal retirement age of an employee who continues in service until normal retirement age. Thus, for example, the benefit formula does not include the accrual method the plan applies (along with the benefit formula) to determine the accrued benefit of an employee who terminates employment before normal retirement age.

Benefits, rights, and features. Benefits, rights, and features means optional forms of benefit, ancillary benefits, and other rights and features within the meaning of § 1.401(a)(4)–4(e). *Benefit, right, or feature* means an optional form of benefit, an ancillary benefit, or an other right or feature within the meaning of § 1.401(a)(4)–4(e).

Contributory DB plan. Contributory DB plan means a defined benefit that includes employee contributions not allocated to separate accounts.

Defined benefit excess plan. Defined benefit excess plan means defined benefit excess plan within the meaning of § 1.401(l)–1(c)(16)(i).

Defined benefit plan. Defined benefit plan means a defined benefit plan within the meaning of § 1.410(b)–9.

Defined contribution plan. Defined contribution plan means a defined contribution plan within the meaning of § 1.410(b)–9.

Employee. With respect to a plan year, *employee* means and employee, within the meaning of § 1.410(b)–9, who is benefiting under the plan within the

meaning of § 1.410(b)–3(a) for the plan year.

Employer. Employer means the employer within the meaning the of § 1.410(b)–9.

ESOP. ESOP or *employee stock ownership plan* means an employee stock ownership plan within the meaning of section 4975(e)(7) or a tax credit employee stock ownership plan within the meaning of section 409(a).

Excess benefit percentage. Excess benefit percentage means excess benefit percentage within the meaning of § 1.401(l)–1(c)(14).

Former employee. Former employee means a former employee within the meaning of § 1.410(b)–9 who is not treated as excludable under § 1.410(b)–6(h).

Fresh-start date. Fresh-start date means a date selected by the employer that is the last day of a plan year and that is the same for all employees in the plan.

Frozen. With respect to an employee's benefits under a plan *frozen* means determined as if the employee terminated employment with the employer as of a date, and without regard to any amendment to the plan adopted after the earlier of that date and the last day of the current plan year, other than amendments adopted after such earlier date but recognized as effective as of or before such earlier date under section 401(b) or § 1.401(a)(4)–11(g). In the case of an employee who terminates employment before the date benefits under the plan are frozen or treated as frozen, *frozen* means determined as of the date the employee actually terminated employment, without regard to any amendment excluded from consideration under the preceding sentence.

Gross benefit percentage. Gross benefit percentage means gross benefit percentage within the meaning of § 1.401(l)–1(c)(18).

Highly compensated employee. Highly compensated employee means an employee who is a highly compensated employee within the meaning of section 414(q).

Highly compensated former employee. Highly compensated former employee means a former employee who is highly compensated former employee within the meaning of section 414(q)(9).

Nonexcludable employee. Nonexcludable employee means an employee within the meaning of § 1.410(b)–9, other than an excludable employee with respect to the plan as determined under § 1.410(b)–6. A nonexcludable employee may be either a highly or nonhighly compensated nonexcludable employee, depending on the nonexcludable employee's status under section 414(q).

Nonhighly compensated employee. Nonhighly compensated employee means an employee who is not a highly compensated employee.

Nonhighly compensated former employee. Nonhighly compensated former employee means a former employee who is not a highly compensated former employee.

Normalize. With respect to a benefit payable to an employee in a particular form, *normalize* means to convert the benefit to an actuarially equivalent straight life annuity commencing at the employee's testing age under the normalization procedure of § 1.401(a)(4)–3(d)(5)(iv).

Offset plan. Offset plan means an offset plan within the meaning of § 1.401(l)–1(c)(24).

Optional form of benefit. Optional form of benefit means an optional form of benefit within the meaning of § 1.401(a)(4)–4(e)(1).

Plan. Plan means a plan within the meaning of §§ 1.410(b)–7 (a) and (b), after application of the mandatory disaggregation rules of § 1.410(b)–7(c) and the permissive aggregation rules of § 1.410(b)–7(d). Thus, for example, two plans (within the meaning of § 1.410(b)–7(b)) that are treated as a single plan pursuant to the permissive aggregation rules of § 1.410(b)–7(d) are treated as a single plan for purposes of section 401(a)(4).

Plan year. Plan year means the plan year of the plan as defined in the written plan document. In the absence of a specifically designated plan year, the plan year is deemed to be the calendar year.

Plan year compensation—(1) *In general. Plan year compensation* means section 414(s) compensation for the plan year determined by measuring section 414(s) compensation during one of the periods described in paragraphs (2) through (4) of this definition. Whichever period is selected must be applied uniformly to determine the plan year compensation of every employee in the plan.

(2) *Plan year.* This period consists of the plan year.

(3) *Twelve-month period ending in the plan year.* This period consists of a specified 12-month period ending with or within the plan year, such as the calendar year or the period for determining benefit accruals described in § 1.401(a)(4)–3(f)(6).

(4) *Period of plan participation during the plan year.* This period consists of the portion of the plan year during which the employee is a participant in the plan. This period may be used to determine plan year compensation for the plan year in which participation begins, the plan year in which participation ends, or both. This period may be used to determine plan year compensation of purposes of § 1.401(a)(4)–3(d) only if the plan year is also the period for determining benefit accruals under the plan rather than another period as permitted under § 1.401(a)(4)–3(f)(6). Similarly, this period may be used to measure plan year compensation that is treated as average annual compensation under an accumulation plan, as provided in § 1.401(a)(4)–3(b)(8)(x)(B), only if the plan year is also the period for determining benefit accruals under the plan rather than another period as permitted under § 1.401(a)(4)–3(f)(6). Further, selection of this period must be made on a reasonably consistent basis from plan year to plan year in a manner that does not discriminate in favor of highly compensated employees. Discrimination might arise, for example, where this period is selected in all plan years except a plan year in which a highly compensated employee enters the plan at midyear.

Present value. Present value means the value as of a specified date of an amount or series of amounts due thereafter and discounted according to an assumed rate of interest to reflect the time value of money, but not adjusted to reflect the probability of payment of any amount.

QJSA. "QJSA" or "qualified joint and survivor annuity" means a qualified joint and survivor annuity within the meaning of section 417(b).

QSUPP—(1) *In general. QSUPP* or *qualified social security supplement* means a social security supplement that meets each of the requirements in paragraphs (2) through (6) of this definition.

(2) *Accrual*—(i) *General rule.* The amount of the social security supplement payable at any age for which the employee is eligible for the social security supplement is equal to the lesser of—

(A) the employee's old-age insurance benefit, unreduced on account of age, under title II of the Social Security Act, and

(B) The accrued social security supplement, determined under one of the methods in paragraphs (2)(ii) through (2)(iv) of this definition.

(ii) *Section 401(l) plans.* In the case of a section 401(l) plan that is a defined benefit excess plan, each employee's accrued social security supplement equals the employee's average annual

compensation up to the integration level, multiplied by the disparity provided by the plan for the employee's years of service used in determining the employee's accrued benefit under the plan. In the case of a section 401(1) plan that is an offset plan, each employee's accrued social security supplement equals the dollar amount of the offset accrued for the employee under the plan.

(iii) *PIA offset plan*. In the case of a PIA offset plan, each employee's accrued social security supplement equals the dollar amount of the offset accrued for the employee under the plan. For this purpose, a PIA offset plan is a plan that reduces an employee's benefit by an offset based on a stated percentage of the employee's primary insurance amount under the Social Security Act.

(iv) *Other plans*. In the case of any other plan, each employee's social security supplement accrues ratably over the period beginning with the later of the employee's commencement of participation in the plan or the effective date of the social security supplement and ending with the earliest age at which the social security supplement is payable to the employee. The effective date of the social security supplement is the later of the effective date of the amendment adding the social security supplement or the effective date of the amendment modifying an existing social security supplement to comply with the requirements of this definition. In the case of an amendment made by the end of the last plan year beginning before January 1, 1993, to a social security supplement in existence on September 19, 1991, the employer may treat the accrued portion of the social security supplement, as determined under the plan without regard to amendments made after September 19, 1991, as included in the employee's accrued social security supplement, provided that the remainder of the social security supplement is accrued under the otherwise applicable method.

(3) *Vesting*. The plan provides that an employee's right to the accrued social security supplement becomes nonforfeitable within the meaning of section 411 as if it were an early retirement benefit.

(4) *Eligibility*. The plan provides the same eligibility conditions on receipt of the social security supplement as on receipt of the early retirement benefit in conjunction with which the social security supplement is payable. Furthermore, if the service required for an employee to become eligible for the social security supplement exceeds 15 years, then the ratio percentage of the group of employees who actually satisfy the eligibility conditions on receipt of the QSUPP in the current plan year equals or exceeds the unsafe harbor percentage applicable to the plan under § 1.410(b)–(c)(4)(ii).

(5) *QJSA*. At each age, the most valuable QSUPP commencing at that age must be payable in conjunction with the QJSA commencing at that age. In addition, the plan must provide that, in the case of a social security supplement payable in conjunction with a QJSA, the social security supplement will be paid after the employee's death on the same terms as the QJSA, but in no event for a period longer than the period for which the social security supplement would have been paid to the employee had the employee not died. For example, if the QJSA is in the form of a joint annuity with a 50-percent survivor's benefit, the social security supplement must provide a 50-percent survivor's benefit. When section 417(c) requires the determination of a QJSA for purposes of determining a qualified pre-retirement survivor's annuity as defined in section 417(c) ("QPSA"), the social security supplement payable in conjunction with that QJSA must be paid in conjunction with the QPSA.

(6) *Protection*. The plan specifically provides that the social security supplement is treated as an early retirement benefit that is protected under section 411(d)(6) (other than for purposes of sections 401(a)(11) and 417). Thus, the accrued social security supplement continues to be payable notwithstanding subsequent amendment of the plan (including the plan's termination), and an employee may meet the eligibility requirements for the social security supplement after plan termination.

Qualified plan. Qualified plan means a plan that satisfies section 401(a). For this purpose, a qualified plan includes an annuity plan described in 403(a).

Ratio percentage. Ratio percentage means ratio percentage within the meaning of § 1.410(b)–9.

Section 401(a)(17) employees. Section 401(a)(17) employee means a section 401(a)(17) employee within the meaning of § 1.401(a)(17)–1(e)(2)(ii).

Section 401(k) plan. Section 401(k) plan means a plan consisting of elective contributions described in § 1.401(k)–1(g)(3) under a qualified cash or deferred arrangement described in § 1.401(k)–1(a)(4)(i).

Section 401(l) plan. Section 401(l) plan means a plan that—

(1) Provides for a disparity in employer-provided benefits or contributions that satisfies section 401(l) in form, and

(2) Relies on one of the safe harbors in § 1.401(a)(4)–2(b)(3), 1.401(a)(4)–3(b), 1.401(a)(4)–8(b)(3), or 1.401(a)(4)–8(c)(3)(iii)(B) to satisfy section 401(a)(4).

Section 401(m) plan. Section 401(m) plan means a plan consisting of employee contributions described in § 1.401(m)–1(f)(6) or matching contributions described in § 1.401(m)–1(f)(12), or both.

Section 414(s) compensation—(1) *In general*. When used with reference to compensation for a plan year, 12-month period, or other specified period, "section 414(s) compensation" means compensation measured using an underlying definition that satisfies section 414(s). Whether an underlying definition of compensation satisfies section 414(s) is determined on a year-by-year basis, based on the provisions of section 414(s) in effect for the applicable plan year, and if relevant, the employer's highly and nonhighly compensated employees for that plan year. Notwithstanding the foregoing, see paragraph (3) of this definition for rules for determining section 414(s) compensation for plan years or 12-month periods beginning before January 1, 1988.

(2) *Determination period for section 414(s) nondiscrimination requirement*—(i) *General rule*. If a definition of underlying compensation must satisfy the nondiscrimination requirement in § 1.414(s)–1(d) in order to satisfy section 414(s) for a plan year, any one of the following determination periods may be used—

(A) The plan year,

(B) The calendar year ending in the plan year, or

(C) The 12-month period ending in the plan year that is used to determine the underlying definition of compensation.

(ii) *Exception for partial plan year compensation*. Notwithstanding the general rule in paragraph (2)(i) of this definition, if the period for measuring underlying compensation is the portion of the plan year during which each employee is a participant in the plan (as provided in paragraph (4) of the definition of plan year compensation in this section) that period must be used as the determination period.

(3) *Years before 1988*. Any underlying definition of compensation used to measure the amount of employees' compensation for a plan year or a 12-month period beginning before January 1, 1988, for purposes of this definition is not required to satisfy section 414(s), provided that the definition was nondiscriminatory based on the facts and circumstances in effect for that plan year or for the plan year in which that

12-month period ends and the definition is used consistently to determine the compensation for the plan year or the 12-month period for all employees in the plan.

(4) *Plans using permitted disparity.* In the case of a section 401(*l*) plan or a plan that imputes permitted disparity in accordance with § 1.401(a)(4)-7, an underlying definition of compensation is not section 414(s) compensation, if the definition results in significant under-inclusion of compensation for employees.

Social security supplement. Social security supplement means a social security supplement within the meaning of § 1.411(a)-7(c)(4)(ii).

Standard interest rate. Standard interest rate means an interest rate that is neither less than 7.5 percent nor greater than 8.5 percent, compounded annually. The Commissioner may, in revenue rulings, notices, and other guidance of general applicability, change the definition of standard interest rate.

Standard mortality table. Standard mortality table means one of the following tables: the UP-1984 Mortality Table (Unisex); the 1983 Group Annuity Mortality Table (1983 GAM) (Female); the 1983 Group Annuity Mortality Table (1983 GAM) (Male); the 1983 Individual Annuity Mortality Table (1983 IAM) (Female); the 1983 Individual Annuity Mortality Table (1983 IAM) (Male); the 1971 Group Annuity Mortality Table (1971 GAM) (Female); the 1971 Group Annuity Mortality Table (1971 GAM) (Male); the 1971 Individual Annuity Mortality Table (1971 IAM) (Female); or the 1971 Individual Annuity Mortality Table (1971 IAM) (Male). These standard mortality tables are available from the Society of Actuaries, 475 N. Martingale Road, Suite 800, Schaumberg, Illinois 60173. The Commissioner may, in revenue rulings, notices, and other guidance of general applicability, change the definition of standard mortality table.

Straight life annuity. Straight life annuity means an annuity payable in equal installments for the life of the employee that terminates upon the employee's death.

Straight life annuity factor. Straight life annuity factor means the actuarial present value of an immediate straight lift annuity equal to $1 per year. The straight life annuity factor may reflect equal periodic payments made more frequently than annually, provided that they total $1 per year.

Testing age. With respect to an employee, *testing age* means the age determined for the employee under the following rules—

(1) If the plan provides the same uniform normal retirement age for all employees in the plan, the employee's testing age is the employee's normal retirement age under the plan.

(2) If a plan provides different uniform normal retirement ages for different employees or different groups of employees in the plan, the employee's testing age is the employee's latest normal retirement age under any uniform normal retirement age under the plan, regardless of whether that particular uniform normal retirement age actually applies to the employee under the plan.

(3) If the plan does not provide a uniform normal retirement age, the employee's testing age is 65.

(4) If an employee is beyond the testing age otherwise determined for the employee under paragraphs (1) through (3) of this definition, the employee's testing age is the employee's current age. The rule in the preceding sentence does not apply in the case of a defined benefit plan that does not satisfy the requirements of § 1.401(a)(4)-3(f)(3)(i)(A) through (C) (permitting certain increases to be disregarded in an employee's benefits due to delayed commencement of benefits after normal retirement age).

Testing compensation. Testing compensation means testing compensation within the meaning of § 1.401(a)(4)-3(e)(2).

Testing service—(1) *Defined contribution plans.* In the case of a defined contribution plan, *testing service* means the number of plan years for which an amount taken into account under § 1.401(a)(4)-2(c)(2)(ii) has been allocated or treated as allocated to the account of the employee under the plan.

(2) *Defined benefit plans*—(i) *General rule.* In the case of a defined benefit plan, "testing service" means an employee's years of service as defined in the plan for purposes of applying the benefit formula under the plan, provided that the plan uses the same definition of years of service for this purpose for all employees in the plan. Alternatively, testing service may be determined for all employees in the plan under the rules of paragraph (2)(ii) of this definition, even though the plan uses the same definition of years of service for all employees in the plan.

(ii) *Plans with nonuniform service definition.* In the case of a defined benefit plan that does not use the same definition of years of service for purposes of applying the benefit formula under the plan to all employees in the plan, *testing service* means the number of plan years the employee has benefited under the plan within the meaning of section 410(b), plus an employee's years of service as defined in the plan for purposes of applying the benefit formula under the plan with respect to years of service (if any) before the employee first benefited under the plan. For plan years beginning before the first day of the first plan year for which the amendments made to section 410(b) by section 1112(a) of the Tax Reform Act of 1986 apply to the plan, an employee is treated as benefiting under the plan for a plan year if the employee was covered under the plan for the plan year for purposes of section 410(b) as in effect at that time.

(iii) *Service caps ignored.* In determining an employee's testing service, any limitation on the number of years of service taken into account for purposes of applying the benefit formula under the plan is disregarded.

(3) *Limitations on testing service.* For purposes of determining testing service, only service with the employer (or a predecessor employer within the meaning of section 414(a)) may be taken into account, plus any period of imputed service permitted under § 1.401(a)(4)-11(d)(2). An employee may be credited with no more than 1 year of testing service with respect to any plan year. In the case of a short plan year, an employee may be credited with no more than a fraction of a year of testing service, determined by dividing the number of months in the plan year by 12.

(4) *Time of determination.* An employee's testing service generally is determined as of the close of the current plan year. However, in applying the projected method in § 1.401(a)(4)-3(d)(4) or the fresh-start alternative to the project method in § 1.401(a)(4)-3(d)(6)(viii), testing service is determined as of the date (other than a fresh-start date, if applicable) that the employee's benefits under the plan are treated as frozen. Thus, for example, in determining an employee's normal accrual rate under § 1.401(a)(4)-3(d)(4)(i), the employee's testing service is determined as of the employee's testing age. Similarly, in determining an employee's most valuable accrual rate under § 1.401(a)(4)-3(d)(4)(ii), the employee's testing service is determined as of the date payment of the underlying QJSA and QSUPP (if any) would commence to the employee under the plan. If, as a result, an employee's testing service is determined as of a date after the current plan year, the employee's testing service is determined by assuming that the amount of testing service credited to the employee for the current plan year continues to be

credited to the employee in each future plan year through the date on which the employee's benefits under the plan are treated as frozen.

Uniform normal retirement age. Uniform normal retirement age means a single normal retirement age that does not exceed age 65 and that is the same for all of the employees in a given group. A group of employees do not fail to have a uniform normal retirement age merely because the plan provides that the normal retirement age of all employees in the group is the later of a stated age (not exceeding age 65) or a stated anniversary no later than the 5th anniversary of the time the employee commenced participation in the plan.

Year of service. Year of service means a year of service as defined in the plan for a specific purpose, including the method of crediting service for that purpose under the plan. In the absence of a specific indication to the contrary, the term *year of service* generally refers to a year of service as defined in the plan for purposes of applying the benefit formula or accrual method under the plan. An employee may be credited with no more than 1 year of service with respect to any 12-consecutive-month period, except for those cases in which additional service is required to be credited under section 410 or 411, whichever is applicable.

§ 1.401(a)(4)-13 Effective dates and fresh-start rules.

(a) *In general.* Sections 1.401(a)(4)–1 through 1.401(a)(4)–13 apply to plan years beginning on or after January 1, 1992. For plan years beginning before that date and on or after the first day of the first plan year to which the amendments made to section 410(b) by section 1112(a) of the Tax Reform Act of 1986 ("TRA '86") apply, a plan must be operated in accordance with a reasonable, good faith interpretation of section 401(a)(4), taking into account pre-existing guidance and the amendments made by TRA '86 to related provisions of the Code (including, for example, sections 401(l), 401(a)(17), and 401(b)). Whether a plan is operated in accordance with a reasonable, good faith interpretation of section 401(a)(4) will generally be determined on the basis of all relevant facts and circumstances, including the extent to which an employer has resolved unclear issues in its favor. A plan will be deemed to be operated in accordance with a reasonable, good faith interpretation of section 401(a)(4) if it is operated in accordance with the terms of §§ 1.401(a)(4)–1 through 1.401(a)(4)–13.

(b) *Effective date for governmental plans.* In the case of governmental plans described in section 414(d), including section 401(a) plans and nonelective plans subject to section 403(b)(12)(A)(i), section 401(a)(4) is considered satisfied for plan years beginning before the later of January 1, 1993, or 90 days after the opening of the first legislative session beginning on or after January 1, 1993, of the governing body with authority to amend the plan, if that body does not meet continuously. For purposes of this paragraph (b), the term "governing body with authority to amend the plan" means the legislature, board, commission, council, or other governing body with authority to amend the plan.

(c) *Fresh-start rules for defined benefit plans*—(1) *Introduction*—(i) *In general.* In order to use the fresh-start rules under § 1.401(a)(4)–3(b)(8)(viii), 1.401(a)(4)–3(d)(6) (vii) or (viii), 1.401(a)(4)–8(b)(3)(ii)(A), or 1.401(a)(4)–8(c)(3)(xi), a defined benefit plan (or the stated benefit formula under a target benefit plan) must, for plan years after the fresh-start date, determine each employee's accrued benefit under the plan under one of the formulas provided in paragraphs (c)(2) through (c)(4) of this section. Paragraphs (c)(5) and (c)(6) of this section allow certain changes in an employee's accrued benefit frozen as of the fresh-start date (the employee's "frozen accrued benefit") for purposes of applying the formulas after the fresh-start date. See § 1.401(a)(4)–12 for the definitions of "fresh-start date" and "frozen."

(ii) *Consistency.* Unless otherwise provided, the same fresh-start formula must be applied to all employees who have accrued benefits as of the fresh-start date and who have at least one hour of service with the employer in a plan year beginning after that date. Thus, for example, if two or more plans are aggregated and treated as a single plan for purposes of sections 401(a)(4) and 410(b) in the plan year ending on the fresh-start date or any later year, those plans are also treated as a single plan for purposes of this paragraph (c). Thus, if a plan makes a fresh start and for a later plan year is aggregated for purposes of section 401(a)(4) with another plan that did not make the same fresh start, the aggregated plan must make a new fresh start in order to use any of the fresh-start rules referenced in paragraph (c)(1)(i) of this section for that later plan year or any subsequent plan year.

(iii) *Multiple fresh starts.* If a plan makes a new fresh start after having made an earlier fresh start, each employee's accrued benefit, as determined under the original fresh-start formula as of the new fresh-start date, must be frozen as of the new fresh-start date for purposes of applying the new fresh-start formula.

(2) *Formula without wear-away.* An employee's accrued benefit under the plan is equal to the sum of—

(i) The employee's frozen accrued benefit, and

(ii) The employee's accrued benefit determined under the formula applicable to benefit accruals in the current plan year as applied to years of service after the fresh-start date.

(3) *Formula with wear-away.* An employee's accrued benefit under the plan is equal to the greater of—

(i) The employee's frozen accrued benefit, or

(ii) The employee's accrued benefit determined under the formula applicable to benefit accruals in the current plan year as applied to the employee's total years of service for the employer before and after the fresh-start date.

(4) *Formula with extended wear-away.* An employee's accrued benefit under the plan is equal to the greater of—

(i) The sum determined under paragraph (c)(2) of this section, or

(ii) The employee's accrued benefit determined under the formula applicable to benefit accruals in the current plan year as applied to the employee's total years of service for the employer before and after the fresh-start date.

(5) *Permitted adjustments.* An employee's accrued benefit will not fail to be frozen as of the fresh-start date merely because the plan increases the employee's frozen accrued benefit in one or more of the ways described in paragraphs (c)(5) (i) through (iv) of this section. Any adjustment must be made uniformly for all employees with frozen accrued benefits under the plan.

(i) *Increases in section 415 limits.* A plan may provide for increases in the frozen accrued benefit of every employee in the plan whose benefit would be greater, but for the application of section 415, to the extent permitted under section 415(d)(1).

(ii) *Former employees.* A plan may increase the benefits of former employees who were employees on the fresh-start date, if the increase satisfies the requirements of § 1.401(a)(4)–10 and applies consistently to all former employees with frozen accrued benefits under the plan.

(iii) *Adjusted accrued benefit.* A plan that satisfies the requirements of paragraph (d) of this section may make

the adjustments described in paragraphs (d)(5) and (d)(6) of this section. However, if the plan makes a new fresh start after the effective date applicable to the plan under paragraph (a) or (b) of this section, in accordance with paragraph (c)(1)(iii) of this section the adjustments otherwise permitted under paragraph (d)(6) of this section must cease as of the new fresh-start date.

(iv) *Compensation adjustments to top-heavy minimum benefits.* If the frozen accrued benefit of an employee under the plan includes top-heavy minimum benefits, the plan may increase the employee's frozen accrued benefit solely to the extent necessary to comply with the average compensation requirement of section 416(c)(1)(D)(i).

(6) *Benefits, rights, and features*—(i) *Eligibility and vesting.* Service for the employer after the fresh-start date continues to be taken into account for purposes of determining eligibility and vesting for benefits, rights, and features under the plan.

(ii) *Changes in optional forms.* A plan may provide a new optional form of benefit with respect to the frozen accrued benefit, provided the following requirements are met—

(A) The optional form is provided with respect to each employee's entire accrued benefit (i.e., accrued both before and after the fresh-start date).

(B) The plan provided meaningful coverage as of the fresh-start date, as described in paragraph (d)(3) of this section.

(C) The plan provides meaningful current benefit accruals, as described in paragraph (d)(4) of this section.

(7) *Examples.* The following examples illustrate the provisions of this paragraph (c).

Example 1. (a) Employer M maintains a defined benefit plan with a calendar plan year. The plan contains several formulas covering different groups of employees, and, for plan years before 1996, the plan satisfies section 401(a)(4) by passing the general test of § 1.401(a)(4)-3(c). Effective for the 1996 plan year, the employer amends the plan to satisfy the unit credit safe harbor under § 1.401(a)(4)-3(b)(3). The amended plan formula provides a normal retirement benefit for all employees of 1.25 percent of average annual compensation for each year of service up to 30. The plan otherwise satisfies the requirements of § 1.401(a)(4)-2(b)(2) and (b)(3). For plan years after 1995, each employee's accrued benefit is determined under the fresh-start formula in paragraph (c)(3) of this section (formula with wear-away), using December 31, 1995, as the fresh-start date.

(b) As of December 31, 1995, Employee A has 20 years of service with Employer M, average annual compensation of $40,000, and an accrued benefit of $14,000. As of December 31, 1996, Employee A has 21 years of service with Employer M and average annual compensation of $43,000. Employee A's accrued benefit as of December 31, 1996, is $14,000, the greater of $14,000 (Employee A's accrued benefit frozen as of December 31, 1995) and $11,288 (1.25 percent × $43,000 × 21 years).

(c) As of December 31, 2000, Employee A has 25 years of service with Employer M and average annual compensation of $52,000. Employee A's accrued benefit as of December 31, 2000, is $16,250, the greater of $14,000 (Employee A's accrued benefit frozen as of December 31, 1995) and $16,250 (1.25 percent × $52,000 × 25 years).

Example 2. (a) Employer Y maintains a defined benefit plan with a calendar plan year. The plan formula provides an employee with a normal retirement benefit at age 65 of 1 percent of average annual compensation up to covered compensation multiplied by the employee's years of service for Employer Y, plus 1.5 percent of average annual compensation in excess of the covered compensation, multiplied by the employee's years of service for Employer Y up to 40.

(b) For plan years beginning after 1992, Employer Y amends the plan formula to provide a normal retirement benefit of 0.75 percent of average annual compensation up to covered compensation multiplied by the employee's total years of service for Employer Y up to 35, plus 1.4 percent of average annual compensation in excess of covered compensation multiplied by the employee's years of service for Employer Y up to 35. For plan years after 1992, each employee's accrued benefit is determined under the fresh-start formula in paragraph (c)(4) of this section (formula with extended wear-away), using December 31, 1992, as the fresh-start date.

(c) As of December 31, 1992, Employee C has 10 years of service for Employer Y, has average annual compensation of $38,000, and has covered compensation of $30,000. Employee C's accrued benefit as of December 31, 1992, is therefore $4,200 ((1 percent × $30,000 × 10 years) + (1.5 percent × $8,000 × 10 years)). As of December 31, 1993, Employee C has 11 years of service for Employer Y, has average annual compensation of $40,000, and has covered compensation of $32,000. Employee C's accrued benefit as of December 31, 1993, is $4,762, the greater of—

(1) $4,762, the sum of Employee C's accrued benefit frozen as of December 31, 1992, ($4,200) and the amended formula applied to Employee C's years of service after 1992 ((0.75 percent × $32,000 × 1 year) + (1.4 percent × $8,000 × 1 year), or $562)), or

(2) $3,872, the amended formula applied to Employee C's total years of service ((0.75 percent × $32,000 × 11 years) + (1.4 percent × percent $8,000 × 11 years)).

(d) *Plans using pre-effective-date fresh-start dates*—(1) *In general.* A defined benefit plan that uses a fresh-start date before the effective date applicable to the plan under paragraph (a) or (b) of this section, and that satisfies the requirements of paragraphs (d)(2) through (d)(5) of this section, may substitute an employee's adjusted accrued benefit for the employee's frozen accrued benefit in applying the formulas in paragraphs (c)(2) through (c)(4) of this section (or paragraph (f)(2) of this section, if applicable).

(2) *Average pay requirement.* As of the fresh-start date, the plan contained a benefit formula under which increases in an employee's benefits accrued as of the fresh-start date would have been determined by reference to the employee's compensation in plan years beginning after the fresh-start date. A plan would satisfy this requirement, for example, if it based benefits on an employee's highest average pay over a fixed period of years or on an employee's average pay over the employee's entire career with the employer.

(3) *Meaningful coverage as of fresh-start date.* The plan provided meaningful coverage as of the fresh-start date. A plan provided meaningful coverage as of the fresh-start date if the group of employees with accrued benefits under the plan as of the fresh-start date satisfied the minimum coverage requirements of section 410(b) as in effect on that date (including the average benefit percentage test, if applicable). In order to satisfy the requirement in the preceding sentence, an employer may amend the plan to grant past service credit under the formula in effect as of the fresh-start date to nonhighly compensated employees, provided that the amount of past service granted them is reasonably comparable, on average, to the amount of past service highly compensated employees have under the plan. The portion of an amendment that grants past service credit to nonhighly compensated employees as described in the preceding sentence is not considered adopted after the fresh-start date for purposes of paragraph (d)(2) of this section or for purposes of the definition of "frozen" in § 1.401(a)(4)-12. Thus, any benefit increase that results from the grant of past service credit to a nonhighly compensated employee under this paragraph (d)(3) is included in the employee's frozen accrued benefit.

(4) *Meaningful current benefit accruals.* The benefit formula and accrual method under the plan provides benefit accruals in the current plan year (other than increases in benefits accrued as of the fresh-start date) that are meaningful in comparison to the rate at which benefits accrued in plan years beginning before the fresh-start date.

(5) *Minimum benefit adjustment*—(i) *In general.* In the case of a section 401(l) plan or a plan that imputes disparity under § 1.401(a)(4)-7, the plan makes the

minimum benefit adjustment described in paragraph (d)(5)(ii) or (iii) of this section.

(ii) *Excess or offset plans.* In the case of a plan that is a defined benefit excess plan as of the fresh-start date, each employee's frozen accrued benefit is adjusted so that the base benefit percentage is not less than 50 percent of the excess benefit percentage. In the case of a plan that is a PIA offset plan as of the fresh-start date, each employee's offset as applied to determine the frozen accrued benefit is adjusted so that it does not exceed 50 percent of the benefit determined without applying the offset. For purposes of this paragraph (d)(5)(ii), a PIA offset plan is a plan that applies the plan's benefit rates uniformly regardless of an employee's compensation, but that reduces an employee's benefit by a stated percentage of the employee's primary insurance amount under the Social Security Act.

(iii) *Other plans.* In the case of a plan that is not described in paragraph (d)(5)(ii) of this section, each employee's frozen accrued benefit is adjusted in a manner that is economically equivalent to the adjustment required under that paragraph, taking into account the plan's benefit formula, accrual rate, and relevant employee factors, such as period of service.

(6) *Adjusted accrued benefit*—(i) *General rule.* The term *adjusted accrued benefit* means an employee's frozen accrued benefit that is adjusted as provided in paragraph (d)(5) of this section, and then multiplied by a fraction (not less than 1) determined under one of the following methods that is the same for every employee in the plan—

(A) *Old compensation fraction.* The numerator is the employee's compensation for the current plan year determined under the compensation definition and formula used to determine the frozen accrued benefit, and the denominator is the employee's compensation for the plan year ending on the fresh-start date determined under the same compensation definition and formula used in the numerator.

(B) *New compensation fraction.* The numerator is the employee's average annual compensation for the current plan year, and the denominator is the employee's average annual compensation for the plan year ending on the fresh-start date, determined in the same manner as the numerator.

(C) *Reconstructed compensation fraction.* The numerator is the employee's average annual compensation for the current plan year, and the denominator is the employee's reconstructed average annual compensation, as defined in paragraph (d)(6)(ii) of this section.

In determining the numerators and the denominators of the fractions described in this paragraph (d)(6), the annual compensation limit under section 401(a)(17) generally applies. See, however, § 1.401(a)(17)–1(e)(4) for special rules applicable to section 401(a)(17) employees.

(ii) *Reconstructed average annual compensation.* The term reconstructed average annual compensation means an employee's average annual compensation for the plan year ending on the fresh-start date determined under the following method for every employee in the plan—

(A) Select a single plan year beginning after the fresh-start date but beginning not later than December 31, 1992.

(B) Determine the employee's average annual compensation for the selected plan year under the same method used to determine the employee's average annual compensation for the current plan year under paragraph (d)(6)(i)(C) of this section.

(C) Multiply the employee's average annual compensation for the selected plan year by a fraction, the numerator of which is the employee's compensation for the plan year ending on the fresh-start date determined under the same compensation definition and formula used to determine the employee's frozen accrued benefit, and the denominator of which is the employee's compensation for the selected plan year determined under the compensation definition and formula used to determine the employee's frozen accrued benefit. The product is the employee's reconstructed average annual compensation.

(iii) *Permissible compensation definitions.* Any compensation or average annual compensation definition used for purposes of this paragraph (d)(6) must be the same for every employee with benefits accrued under the plan as of the fresh-start date. The definition may, but need not, be the same as the compensation or average annual compensation definition used in the current plan year for other purposes under section 401(a)(4).

(iv) *Option to make less than the full permitted adjustment.* A plan may make less than the full increase in each employee's frozen accrued benefit ("FAB") as permitted under paragraph (d)(6)(i) of this section by determining each employee's adjusted accrued benefit ("AAB") under the following formula, where P is a single percentage (not to exceed 100 percent) designated in the plan for this purpose, and where F is one of the fractions described in paragraph (d)(6)(ii) of this section that is the same for all employees in the plan:

$$AAB = FAB + [P \times FAB \times (F - 1)]$$

In addition, a plan may impose a uniform maximum dollar amount on the adjusted accrued benefit of every employee in the plan or, in the alternative, of every highly compensated employee in the plan, provided the maximum dollar amount does not reduce any employee's accrued benefit. Furthermore, the plan may, at any time, terminate all future adjustments permitted under this paragraph (d).

(7) *Examples.* The following examples illustrate this paragraph (d).

Example 1. (a) Employer X maintains a defined benefit plan with a calendar plan year. Effective for the 1991 plan year, the plan is amended to provide a new formula. The amended plan also provides that, for plan years after 1990, each employee's accrued benefit is determined under the formula in paragraph (c)(3) of this section (formula with wear-away) and, in applying the fresh-start formula, each employee's frozen accrued benefit under paragraph (c)(3)(i) of this section will be adjusted under this paragraph (d), using the new compensation fraction under paragraph (d)(6)(i)(B) of this section. The plan is not a section 401(l) plan and does not impute permitted disparity under § 1.401(a)(4)–7 for years after 1990; thus, the minimum benefit adjustment under paragraph (d)(5) of this section does not apply.

(b) As of December 31, 1990, Employee A has average annual compensation of $24,000 and an accrued benefit of $3,000. As of December 31, 1994, Employee A has average annual compensation (determined in the same manner as average annual compensation as of December 31, 1990) of $30,000. As of December 31, 1994, Employee A's adjusted accrued benefit is $3,750 ($3,000 × $30,000/$24,000). Thus, Employee A's accrued benefit is the greater of $3,750 and the employee's accrued benefit determined under the new formula as applied to the employee's total years of service.

Example 2. (a) Employer Y maintains a defined benefit excess plan with a calendar plan year. For plan years before 1989, the plan is integrated with benefits provided under the Social Security Act, providing each employee with a normal retirement benefit equal to 1 percent of the employee's average annual compensation in excess of the employee's covered compensation, multiplied by the employee's years of service for Y. The benefit formula thus provides no benefit with respect to average annual compensation up to covered compensation.

(b) As of December 31, 1988, Employee A has 10 years of service for Y and has covered compensation of $25,000 and average annual compensation of $20,000. Employee A's average annual compensation has never exceeded $20,000. Therefore, as of December 31, 1988, Employee A's accrued benefit under the plan is zero.

(c) Effective with the 1989 plan year, the plan is amended to provide each employee with a normal retirement benefit of 0.6

percent of average annual compensation up to covered compensation plus 1.2 percent of average annual compensation in excess of covered compensation, multiplied by the employee's years of service up to 35. The plan also provides that, for plan years after 1988, each employee's accrued benefit is determined under the formula in paragraph (c)(2) of this section (formula without wear-away) and, in applying the fresh-start formula, each employee's frozen accrued benefit under paragraph (c)(3)(i) of this section will be adjusted under this paragraph (d), using the old compensation fraction under paragraph (d)(6)(i)(A) of this section.

(d) The plan is a section 401(l) plan and thus must also make the minimum benefit adjustment under paragraph (d)(5) of this section. Because the excess benefit percentage under the plan for years before 1989 was 1 percent, the plan must provide a base benefit percentage for those years of at least 0.5 percent. After the minimum benefit adjustment, Employee A's accrued benefit as of December 31, 1988, is $1,000 (0.5 percent × $20,000 × 10 years).

(e) As of December 31, 1992, Employee A has 14 years of service and has covered compensation of $30,000 and average annual compensation of $35,000. Employee A's adjusted accrued benefit as of December 31, 1992, is $1,750 ($1,000 × $35,000/$20,000), and Employee A's accrued benefit as of December 31, 1992, is $2,710 (the sum of $1,750 plus $960 ((0.6 percent × $30,000 × 4 years) plus (1.2 percent × $5,000 × 4 years))).

Example 3. (a) Employer Z maintains an offset plan with a calendar plan year. For plan years before 1989, the plan is integrated with benefits provided under the Social Security Act, providing each employee with a normal retirement benefit of 50 percent of average annual compensation, offset by 83⅓ percent of the employee's projected primary insurance amount under the Social Security Act. The plan determines each employee's accrued benefit under the fractional accrual rule of section 411(b)(1)(C).

(b) As of December 31, 1988, Employee A, who was hired at age 40, has 10 years of service for Z and has projected service at normal retirement age of 65. Employee A also has a projected annual primary insurance amount of $10,000, covered compensation of $25,000, and average annual compensation of $30,000. Therefore, as of December 31, 1988, Employee A's accrued benefit under the plan is $2,667 ((50 percent x $30,000) minus (83⅓ percent × $10,000)) × 10/25))

(c) Effective with the 1989 plan year, the plan is amended to provide each employee with a normal retirement benefit of 2 percent of average annual compensation reduced by 0.65 percent of final average compensation up to covered compensation per year of service. The plan also provides that, for plan years after 1988, each employee's accrued benefit is determined under the formula in paragraph (c)(2) of this section (formula without wear-away) and, in applying the fresh-start formula, each employee's frozen accrued benefit under paragraph (c)(3)(i) of this section will be adjusted under this paragraph (d), using the old compensation fraction under paragraph (d)(6)(i)(A) of this section.

(d) The plan is a section 401(l) plan and thus must also make the minimum benefit adjustment under paragraph (d)(5) of this section. Because the offset applied to determine Employee A's frozen accrued benefit as of December 31, 1988 ($3,333), exceeded 50 percent of the benefit determined without regard to the offset ($6,000), the offset must be reduced to no more than 50 percent. After the minimum benefit adjustment, Employee A's accrued benefit as of December 31, 1988, is $3,000 ($6,000 minus the reduced offset of $3,000).

(e) As of December 31, 1992, Employee A has 14 years of service and has covered compensation of $30,000 and average annual compensation and final average compensation of $40,000. Employee A's adjusted accrued benefit as of December 31, 1992, is $4,000 ($3,000 × $40,000/$30,000), and Employee A's accrued benefit as of December 31, 1992, is $6,420 (the sum of $4,000 plus $2,420 ((2 percent × $40,000 × 4 years) minus (0.65 percent × $30,000 × 4 years))).

(e) *Special fresh-start rules for target benefit plans*—(1) *Plans qualified under prior law.* A target benefit plan that was adopted and in effect on September 19, 1991, and that satisfied the applicable nondiscrimination requirements for target benefit plans on that date and in all prior periods, may be treated as satisfying the requirements of § 1.401(a)(4)–8(b)(3) in plan years beginning before the effective date applicable to the plan under paragraph (a) or (b) of this section that were taken into account in determining employees' stated benefits. In determining whether a plan satisfied the applicable nondiscrimination requirements for target benefit plans for any period prior to the applicable effective date, no amendments after September 19, 1991 other than amendments necessary to satisfy section 401(l), are taken into account

(2) *Determination of initial theoretical reserve.* In the case of a target benefit plan described in paragraph (e)(1) of this section, the theoretical reserve, as of the determination date (within the meaning of § 1.401(a)(4)–8(b)(3)(iv)(A)) for the last plan year beginning before the earlier of the first day of the first plan year in which the plan actually satisfied § 1.401(a)(4)–8(b)(3) (i.e., without regard to paragraph (e)(1) of this section) or the effective date applicable to the plan under paragraph (a) or (b) of this section, of an employee who was a participant in the plan on such earlier date is determined as follows—

(i) Determine the actuarial present value, as of the determination date, of the stated benefit that the employee is projected to have at the employee's normal retirement age, using the actuarial assumptions, the provisions of the plan, and the employee's compensation as of the determination date. For an employee beyond normal retirement, determine the actuarial present value of the employee's stated benefit at current age, but using a straight life annuity factor as of normal retirement age.

(ii) Calculate the present value of future required employer contributions as of the determination date (i.e., the present value of the level contributions due for each plan year through the end of the plan year in which the employee attains normal retirement age). This calculation is made using the actuarial assumption as of the determination date and the required contribution for the plan year including the determination date.

(iii) Determine the excess, if any, of the amount determined in paragraph (e)(2)(i) of this section over the amount determined in paragraph (e)(2)(ii) of this section. This is the employee's theoretical reserve on the determination date.

(3) *Example.* The following example illustrates the determination of an employee's theoretical reserve.

Example. (a) A target benefit plan that in 1991 satisfies the requirements of Rev. Rul. 76–464, 1976–2 C.B. 115, provides a stated benefit equal to 40 percent of compensation, payable annually as a straight life annuity beginning at normal retirement age. Normal retirement age under the plan is 65. The stated interest rate under the plan is 6 percent. The determination date for required contributions under the plan is the last day of the plan year. Employee A is 38 years old on the determination date for the 1991 plan year, has participated in the plan for 5 years, and has compensation equal to $60,000 in 1991. The amount of employer contribution to Employee A's account for 1991 was $2,468.

(b) Under these facts, Employee A's theoretical reserve is equal to $13,909, calculated as follows:

(1) The actuarial present value of Employee A's stated benefit is calculated using the actuarial assumptions, provisions of the plan and Employee A's compensation as of the determination date for the 1991 plan year. This amount is equal to $46,512, Employee A's stated benefit of $24,000 ($60,000 multiplied by 40 percent), multiplied by 1.938, the actuarial present value factor applicable to a participant who is 38 years old using a stated interest rate of 6 percent.

(2) The actuarial present value of future employer contributions is calculated using the actuarial assumptions, provisions of the plan and Employee A's compensation as of the determination date for the 1991 plan year. This amount is equal to $32,603, which is equal to the amount of level employer contribution ($2,468) multiplied by a factor of 13.2105, the temporary annuity factor for a period of 27 years, assuming a stated interest rate of 6 percent.

(3) Employee A's theoretical reserve is $13,909, the excess of the amount determined in paragraph (b)(2) of this *Example* over the

amount determined in paragraph (b)(3) of this *Example*.

(f) *Special fresh-start rules for cash balance plans*—(1) *In general.* In order to satisfy the optional testing method of § 1.401(a)(4)–8(c)(3) after a fresh-start date, a cash balance plan must apply the rules of paragraph (c) of this section as modified under this paragraph (f). Paragraph (f)(2) of this section provides an alternative formula that may be used in addition to the formulas in paragraphs (c)(2) through (c)(4) of this section. Paragraph (f)(3) of this section sets forth certain limitations on use of the formulas in paragraph (c) or (f)(2) of this section.

(2) *Alternative formula*—(i) *In general.* An employee's accrued benefit under the plan is equal to the greater of—

(A) The employee's frozen accrued benefit, or

(B) The employee's accrued benefit determined under the plan's benefit formula applicable to benefit accruals in the current plan year as applied to years of service after the fresh-start date, modified in accordance with paragraph (f)(2)(ii) of this section.

(ii) *Addition of opening hypothetical account.* As of the first day after the fresh-start date, the plan must credit each employee's hypothetical account with an amount equal to the employee's opening hypothetical account (determined under paragraph (f)(2)(iii) of this section), adjusted for interest for the period that begins on the first day after the fresh-start date and that ends at normal retirement age. The interest adjustment in the preceding sentence must be made using the same interest rate applied to the hypothetical allocation for the first plan year beginning after the fresh-start date.

(iii) *Determination of opening hypothetical account*—(A) *General rule.* An employee's opening hypothetical account equals the actuarial present value of the employee's frozen accrued benefit as of the fresh-start date. For this purpose, if the plan provides for a single sum distribution as of the fresh-start date, the actuarial present value of the employee's frozen accrued benefit as of the fresh-start date equals the amount of a single sum distribution payable under the plan on that date, assuming that the employee terminated employment on the fresh-start date, the employee's accrued benefit was 100-percent vested, and the employee satisfied all eligibility requirements under the plan for the single sum distribution. If the plan does not offer a single sum distribution as of the fresh-start date, the actuarial present value of the employee's frozen accrued benefit as of the fresh-start date must be determined using a standard mortality table and the applicable section 417(e) rates, as defined in § 1.417(e)–1(d).

(B) *Alternative opening hypothetical account.* Alternatively, the employee's opening hypothetical account is the greater of the opening hypothetical account determined under paragraph (f)(2)(ii)(A) of this section and the employee's hypothetical account as of the fresh-start date determined in accordance with § 1.401(a)(4)–8(c)(3)(v)(A) calculated under the plan's benefit formula applicable to benefit accruals in the current plan year as applied to the employee's total years of service through the fresh-start date in a manner that satisfies the past service credit rules of § 1.401(a)(4)–8(c)(3)(viii).

(3) *Limitations on formulas*—(i) *Past service restriction.* If the plan does not satisfy the uniform hypothetical allocation formula requirement of § 1.401(a)(4)–8(c)(3)(iii)(B) as of the fresh-start date, under § 1.410(a)(4)–8(c)(3)(viii) the plan may not provide for past service credits, and thus may not use the formula in paragraph (c)(3) of this section (formula with wear-away), the formula in paragraph (c)(4) of this section (formula with extended wear-away), or the alternative determination of the opening hypothetical account in paragraph (f)(2)(iii)(B) of this section.

(ii) *Change in interest rate.* If the interest rate used to adjust employees' hypothetical allocations under § 1.401(a)(4)–8(c)(3)(iv) for the plan year is different from the interest rate used for this purpose in the immediately preceding plan year, the plan must use the formula in paragraph (c)(2) of this section (formula without wear-away).

(iii) *Meaningful benefit requirement.* A plan is permitted to use the formula provided in paragraph (f)(2) of this section only if the plan satisfies paragraphs (d)(3) through (d)(5) of this section (regarding coverage as of fresh-start date, current benefit accruals, and minimum benefit adjustment, respectively).

Par. 4. Section 1.411(d)–4 is amended by revising A–1(a), by adding a sentence at the end of paragraph A–1(b)(1), and by revising A–1(d) to read as follows—

§ 1.411(d)–4 Section 411(d)(6) protected benefits.

* * * * *

A–1: (a) *In general.* The term "section 411(d)(6) protected benefit" includes any benefit that is described in one or more of the following categories—

(1) Benefits described in section 411(d)(6)(A),

(2) Early retirement benefits and retirement-type subsidies described in section 411(d)(6)(B)(i), including qualified social security supplements as defined in § 1.401(a)(4)–12(q), and

(3) Optional forms of benefit described in section 411(d)(6)(B)(ii).

Such benefits, to the extent they have accrued, are subject to the protection of section 411(d)(6) and, where applicable, the definitely determinable requirement of section 401(a) (including section 401(a)(25)) and cannot, therefore, be reduced, eliminated, or made subject to employer discretion except to the extent permitted by regulations.

(b) *Optional forms of benefit—(1) In general.* * * * See § 1.401(a)(4)–4(d) for the definition of an optional form of benefit for plan years beginning on or after January 1, 1992.

* * * * *

(d) *Benefits that are not section 411(d)(6) protected benefits.* The following benefits are examples of items that are not section 411(d)(6) protected benefits:

(1) Ancillary life insurance protection;

(2) Accident or health insurance benefits;

(3) Social security supplements described in section 411(a)(9), except qualified social security supplements as defined in § 1.401(a)(4)–12;

(4) The availability of loans (other than the distribution of an employee's accrued benefit upon default under a loan);

(5) The right to make after-tax employee contributions or elective deferrals described in section 402(g)(3);

(6) The right to direct investments;

(7) The right to a particular form of investment (e.g., investment in employer stock or securities or investment in certain types of securities, commercial paper, or other investment media);

(8) The allocation dates for contributions, forfeitures, and earnings, the time for making contributions (but not the conditions for receiving an allocation of contributions or forfeitures for a plan year after such conditions have been satisfied), and the valuation dates for account balances;

(9) Administrative procedures for distributing benefits, such as provisions relating to the particular dates on which notices are given and by which elections must be made; and

(10) Rights that derive from administrative and operational provisions, such as mechanical procedures for allocating investment

experience among accounts in defined contribution plans.

Fred T. Goldberg,

Commissioner of Internal Revenue.

Approved: August 30, 1991.

Kenneth W. Gideon,

Assistant Secretary of the Treasury.

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DEPARTMENT OF THE TREASURY

26 CFR Part 1

[T.D. 8362]

RIN 1545-AO62

Limitation on Annual Compensation for Qualified Plans

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the $200,000 compensation limit for tax-qualified retirement plans under section 401(a)(17) of the Internal Revenue Code of 1986. These regulations reflect changes made by the Tax Reform Act of 1986 and the Technical and Miscellaneous Revenue Act of 1988. These regulations provide guidance necessary to comply with the law and affect sponsors of, and participants in, tax-qualified retirement plans.

EFFECTIVE DATE: These regulations are effective for plan years beginning on or after January 1, 1991, and are applied to those plan years except as set forth in § 1.401(a)(17)-1(d).

FOR FURTHER INFORMATION CONTACT: David Fuller at 202-377-9372 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Statutory Authority

This document contains final regulations under section 401(a)(17) of the Internal Revenue Code of 1986 (Code). These regulations conform the regulations to section 1106 of the Tax Reform Act of 1986 (TRA '86) and section 1011(d)(4) of the Technical and Miscellaneous Revenue Act of 1988. These regulations are issued under the authority contained in sections 401(a)(17) and 7805 of the Code.

Proposed regulations under section 401(a)(17) were published in the **Federal Register** May 14, 1990 (55 FR 19947). Written comments were received from the public on the proposed regulations. In addition, a public hearing on the proposed section 401(a)(17) regulations was held September 26, 27, and 28, 1990. After consideration of all of the written comments received and the statements made at the public hearing, the proposed regulations under section 401(a)(17) are adopted as modified by this Treasury Decision.

Explanation of Provisions

Overview

Section 401(a)(17) of the Code provides an annual compensation limit for each employee under a qualified plan. This limit applies to a plan in two ways. First, a plan may not base contributions or benefits on compensation in excess of the annual limit. Thus, a plan does not satisfy section 401(a)(17) unless it provides that an employee's compensation in excess of the annual limit is not used in determining plan benefits or contributions for a plan year to which the annual limit applies. Second, the amount of an employee's annual compensation that may be taken into account in applying certain specified nondiscrimination rules under the Code is subject to the annual limitation. Thus, in determining the allocation rates for defined contribution plans and the accrual rates for defined benefit plans, an employee's compensation in excess of the annual limit is disregarded in applying those nondiscrimination rules. The annual compensation limit applies separately to each group of plans that is treated as a single plan for purposes of the applicable nondiscrimination requirement.

1. Annual adjustment of compensation limit

The amount of the annual limit, which applies for plan years beginning after December 31, 1988, is $200,000 adjusted annually for calendar years after 1989 for increases in the cost of living at the same time and in the same manner as under section 415(d). The adjustment applies to plan years, or other 12-month periods used to determine compensation, commencing in the calendar year in which the adjustment is effective. In addition, any increase in the annual limit applies only to compensation taken into account for the year of the increase and subsequent years and does not apply to compensation for prior years that are used in determining an employee's benefit.

Commentators suggested that the annual adjustments to the compensation limit apply for plan years ending in the year to which the limit applies as provided in the regulations under section 415(d) and further suggested that, once the limit is increased for a year, the adjusted limit should be permitted to be taken into account with respect to prior years as well. After careful consideration of these comments, the final regulations retain the rules provided in the proposed regulations. The Treasury and the Service continue to believe this result best implements the statute and Congressional intent as expressed in the Conference Report to TRA '86. See H.R. Rep. No. 99-841, Vol. II, 99th Cong., 2d Sess. II-478 (1986).

2. Proportional reduction in limit

Under the proposed regulations, a proportional reduction was required when a plan determines compensation on a period of time that contains fewer than 12 calendar months. The proposed regulations did not require proration solely because employees are covered under a plan for less than 1 full year if the plan formula for allocations or benefit accruals is based on compensation for a period of at least 12 months. The final regulations retain the proration rule in the proposed regulations. In addition, the final regulations clarify that no proration is required where the plan formula provides that the allocation or accrual for each employee is based on compensation for the portion of the plan year during which the employee is a participant.

3. Multiemployer and multiple employer plans

Compensation limit. Several commentators requested guidance on the manner in which the compensation limit would apply where an employee worked for two or more unrelated employers who maintain the same multiple employer or multiemployer plan. In response to these comments, the final regulations provide that, in the case of multiple employer and multiemployer plans, the annual compensation limit applies separately with respect to the compensation received by an employee from each unrelated employer maintaining the plan rather than to the total compensation from all employers maintaining the plan. Thus, for example, during a year in which the compensation limit was $200,000, assume that an employee participating in a multiemployer plan was employed by three of the employers maintaining the plan and received compensation for a year of $75,000 from one employer maintaining the plan, $40,000 from another employer maintaining the plan, and $95,000 from the third employer. On these facts, the plan would be permitted to take into

account the full $210,000 of the employee's compensation from the three employers for the plan year without violating section 401(a)(17).

Correction of plans maintained by more than one employer. Multiple employer plans must satisfy section 401(a)(17) on an employer-by-employer basis. Failure to satisfy section 401(a)(17) with respect to any component of this testing process may result in disqualification of the plan for all participating employers. The final regulations, like the proposed regulations, do not provide an exception to this rule. However, where a multiemployer plan or a multiple employer plan fails to satisfy section 401(a)(17), in a proper case, the Commissioner could retain the plan's qualified status for innocent employers by requiring corrective and remedial action with respect to the plan, such as allowing the withdrawal of an offending employer, allowing a disqualifying defect to be cured within a reasonable period of time after the plan administrator has or should have knowledge of the disqualifying event or was otherwise notified by the Service of the disqualifying defects, or requiring plan amendments to prevent future disqualifying events.

4. Compensation of self-employed individuals subject to the limit

The proposed regulations provided that the amount of compensation subject to the annual limit for a self-employed individual was determined by subtracting the deduction allowed by section 404 to the individual for contributions to the plan on the individual's behalf from the amount otherwise treated as compensation. This rule was not included in the final regulations because the result intended by the rule may be reached if a plan simply defines compensation of self-employed individuals used in the plan's allocation formula as earned income within the meaning of section 401(c)(2). The subtraction described in the proposed regulations is included automatically in the determination of earned income. Therefore, instead of a specific rule applicable to self-employed individuals, the final regulations contain two examples illustrating the application of section 401(a)(17) to the compensation of self-employed individuals.

5. Effective date and transition rules

Section 401(a)(17) is generally effective for plan years beginning on or after January 1, 1989. A special effective date is provided for collectively bargained plans. The final regulations under section 401(a)(17) are effective for plan years beginning on or after January 1, 1991. For plan years beginning before that date but on or after the date that section 401(a)(17) first applies to a plan, the plan must be operated in accordance with a reasonable, good faith interpretation of the requirements of section 401(a)(17). Whether compliance is reasonable and in good faith will be determined on the basis of all the facts and circumstances, including the extent to which the employer has resolved unclear issues in its favor. Reasonable, good faith interpretation will be deemed to exist, however, if a plan is operated in accordance with the proposed regulations published in the **Federal Register** on May 14, 1990, or these final regulations.

A special effective date is provided for governmental plans within the meaning of section 414(d) to provide governments with adequate time to amend their plans to comply with section 401(a)(17). Thus, the regulations provide that governmental plans described in section 414(d) will automatically satisfy the requirements of section 401(a)(17) for plan years beginning before January 1, 1993.

The final regulations provide, as in the proposed regulations, that the benefits or contributions accrued under a plan for plan years prior to the effective date of section 401(a)(17) are not subject to the annual compensation limit. Thus, an employee's allocations or benefit accruals prior to the 1989 plan year, that are based on compensation in excess of the annual compensation limit, need not reduce or affect the employee's allocations or benefit accruals in subsequent years.

As provided in the proposed regulations, the final regulations provide generally that benefits or contributions accruing or allocated for plan years beginning on or after the section 401(a)(17) effective date may not take into account compensation for any plan year in excess on the annual compensation limit applicable to that plan year. The proposed regulations provided examples illustrating the application of this rule to a high average pay defined benefit plan. In determining the high average pay used in calculating accruals for plan years to which section 401(a)(17) applies, the example showed that there are three general options for implementing this rule. The first is to apply the plan benefit formula (after amendment to satisfy section 401(a)(17)) to all years of service. This method provides for a gradual wear-away of the pre-effective date benefit, the calculation of which took into account compensation exceeding the section 401(a)(17) annual limit. The second option is to apply the plan formula (after amendment to comply with section 401(a)(17)) only to years of service beginning on or after the section 401(a)(17) effective date and simply add those benefits to the benefits that accrued before the effective date. The third option combines the first two options such that the plan formula provides the employee with the larger of the two benefit amounts. All three methods essentially require the amount of an employee's accrued benefit as of the section 401(a)(17) effective date ("pre-effective date benefit") to be fixed.

Commentators requested more guidance with respect to the transition rules than was provided in the samples in the proposed regulations. For example, they inquired whether adjustments were permitted to the pre-effective data benefits to take into account increases in the section 415 dollar limits and whether ad hoc cost-of-living adjustments were permitted to be made to the benefits of former employees whose benefits were originally calculated taking into account compensation in excess of the annual compensation limits.

The final regulations generally retain the examples provided in the proposed regulations illustrating possible methods that may be used to transition into section 401(a)(17) compliance. In addition, the final regulations reflect modifications to coordinate the transition rules under section 401(a)(17) with the transition rules provided in the final regulations under section 401(a)(4) (issued simultaneously with these regulations). Thus, these final regulations incorporate the fresh-start rules in § 1.401(a)(4)–13 (c) and (d) into the section 401(a)(17) transition rules to the extent applicable, with appropriate modifications.

The fresh-start rules in the final section 401(a)(4) regulations generally parallel the examples in the proposed regulations under section 401(a)(17). Thus, under the section 401(a)(4) fresh-start rules, an employee's accrued benefit generally must be fixed ("frozen") as of a certain date selected by an employer ("fresh-start date"), and an employee's benefit accruals for plan years after that date must be determined under the formula in effect for that plan year applied either to years of service after the fresh-start date or all the employee's years of service. The fresh-start rules permit certain adjustments to be made to the frozen accrued benefit, including certain adjustments for increases in the employee's

compensation, adjustments due solely to increases in the limits under section 415(d), and certain benefit accruals on behalf of former employees. Consistent with the final section 401(a)(4) regulations, the fresh-start rules in these final regulations also generally permit similar adjustments to be made to the pre-effective date benefit that are permitted to be made under the fresh-start rules to frozen accrued benefits to extent that they are consistent with the implementation of section 401(a)(17).

Finally, in order to permit employers to implement changes required by TRA '86 and the related regulations in a consistent manner, the final regulations under section 401(a)(17) permit a fresh-start date not later than the last day of the last plan year beginning before January 1, 1992.

Special Analyses

In has been determined that these rules are not major as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations and, therefore, a final Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking for the regulations was submitted to the Administrator of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal authors of these regulations are Marjorie Hoffman and David Fuller of the Office of the Assistant Chief Counsel (Employee Benefits and Exempt Organizations), Internal Revenue Service. However, personnel from other offices of the Service and Treasury participated in their development.

List of Subjects in 26 CFR 1.401–0 through 1.419A–2T

Bonds, Employee benefit plans, Income taxes, Pensions, Reporting and recordkeeping requirements, Securities, Trusts and trustees.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority citation for part 1 is amended by adding the following citation:

Authority: Sec. 7805, 68A Stat. 917; 26 U.S.C. 7805 * * * § 1-401(a)(17)–1 also issued under 26 U.S.C. 401(a)(17). * * *

Par. 2. A new § 1.401(a)(17)–1 is added to read as follows:

§ 1.401(a)(17)–1 Limitation on annual compensation.

(a) *Compensation limit requirement*—(1) *In general.* In order to be a qualified plan, a plan must satisfy section 401(a)(17). Section 401(a)(17) provides an annual compensation limit for each employee under a qualified plan. This limit applies to a qualified plan in two ways. First, a plan may not base allocations, in the case of a defined contribution plan, or benefit accruals, in the case of a defined benefit plan, on compensation in excess of the annual limit. Second, the amount of an employee's annual compensation that may be taken into account in applying certain specified nondiscrimination rules under the Internal Revenue Code is subject to the annual limitation. These two limitations are set forth in paragraphs (b) and (c) of this section, respectively.

(2) *Annual compensation limit.* For purposes of this section, "annual compensation limit" means $200,000, adjusted annually by the Commissioner. The amount of the annual compensation limit is adjusted at the same time and in the same manner as under section 415(d). The base period for the annual adjustment is 1989; the first adjustment is effective on January 1, 1990; and the dollar increase in effect on January 1 is effective for any plan year beginning in the calendar year. For example, if a plan has a plan year beginning July 1, 1989, and ending June 30, 1990, the annual compensation limit in effect on January 1, 1989 ($200,000), applies to the plan for the entire plan year. In addition, if compensation for any plan year beginning prior to the effective date that section 401(a)(17) first applies to a plan is used for determining allocations or benefit accruals, or when applying any nondiscrimination rule, in any year subject to section 401(a)(17), then the annual compensation limit for that prior year is the annual compensation limit for 1989 ($200,000).

(b) *Plan limit on compensation*—(1) *General rule.* A plan does not satisfy section 401(a)(17) unless it provides that the compensation taken into account for any employee in determining plan allocations or benefit accruals for any plan year is limited to the annual compensation limit. For purposes of this rule, allocations and benefit accruals under a plan include all benefits provided under the plan, including ancillary benefits.

(2) *Plan-year-by-plan-year requirement.* For purposes of this paragraph (b), the limit in effect for the current plan year applies only to the compensation for that year that is taken into account in determining plan allocations or benefit accruals for the year. The compensation for any prior plan year taken into account in determining an employee's allocations or benefit accruals for the current plan year is subject to the applicable annual compensation limit in effect for that prior year. Thus, increases in the annual compensation limit apply only to compensation taken into account for the plan year in which the increase is effective. For example, if an employer has a defined benefit plan that bases benefits on the average of an employee's compensation for the three plan years during which the average of the employee's compensation is the highest, compensation for each of the plan years used in the average must be limited to the annual compensation limit in effect for the respective years.

(3) *Application of limit to a plan year*—(i) *In general.* For purposes of applying this paragraph (b), the annual compensation limit is applied to the compensation for the plan year on which allocations or benefit accruals for that plan year are based.

(ii) *Compensation for the plan year.* A plan may determine compensation used in determining allocations or benefit accruals for a plan year based on compensation for the plan year. In this case, the annual compensation limit that applies to the compensation for the plan year is the limit in effect for the calendar year in which the plan year begins. Alternatively, a plan may determine compensation used in determining allocations or benefit accruals for the plan year for all employees on the basis of a 12-consecutive-month period, or periods, ending no later than the last day of the plan year. If compensation is based on these alternative 12-month periods, the annual compensation limit applies to compensation for each of those periods based on the annual compensation limit in effect for the respective calendar year in which each 12-month period begins.

(iii) *Compensation for a period of less than 12-months*—(A) *Proration required.* If compensation for a period of less than

12 months is used for a plan year, then the otherwise applicable annual compensation limit is reduced in the same proportion as the reduction in the 12-month period. For example, if a defined benefit plan provides that the accrual for each month in a plan year is separately determined based on the compensation for that month and the plan year accrual is the sum of the accrual for all months, then the annual compensation limit for each month is 1/12th of the annual compensation limit for the plan year. In addition, if the period for determining compensation used in calculating an employee's allocation or accrual for a plan year is a short plan year (i.e., shorter than 12 months), the annual compensation limit is an amount equal to the otherwise applicable annual compensation limit multiplied by the fraction, the numerator of which is the number of months in the short plan year, and the demonimator of which is 12.

(B) *No proration required for participation for less than a full plan year.* Notwithstanding paragraph (b)(3)(iii)(A) of this section, a plan is not treated as limiting the compensation used in determining an employee's allocations or benefit accruals to a specified portion of the employee's annual compensation merely because the plan formula provides that the allocation or accrual for each employee is based on compensation for the portion of the plan year during which the employee is a participant in the plan. In addition, no proration is required merely because an employee is covered under a plan for less than a full plan year, provided that allocations or benefit accruals are otherwise determined using compensation for a period of at least 12 months.

(4) *Limits on multiple employer and multiemployer plans.* For purposes of this paragraph (b), in the case of a plan described in section 413(c) or 414(f) (a plan maintained by more than one employer), the annual compensation limit applies separately with respect to the compensation of an employee from each employer maintaining the plan rather than the total compensation from all employers maintaining the plan.

(5) *Family aggregation.* [Reserved]

(6) *Examples.* The following examples illustrate the rules in this paragraph (b).

Example 1. Plan X is a defined benefit plan and bases benefits on the average of an employee's high 3 consecutive years' compensation. Section 401(a)(17) applies to Plan X in 1989. Employee B's high 3 consecutive years' compensation prior to the application of the annual compensation limits is $215,000 (1989), $200,000 (1988), and $185,000 (1987). To satisfy this paragraph (b), Plan X cannot base plan benefits for Employee B in 1989 on compensation in excess of $195,000 (the average of $200,000 (B's 1989 compensation capped by the annual compensation limit), $200,000 (B's 1988 compensation), and $185,000 (B's 1987 compensation)). For purposes of determining the 1989 accrual, each year (1989, 1988, and 1987), not the average of the 3 years, is subject to the 1989 annual compensation limit of $200,000.

Example 2. Assume the same facts as in *Example 1.* Also assume that Employee B's compensation in 1990 is $230,000, and that the 1990 annual compensation limit is $209,200. Plan X cannot base plan benefits for Employee B in 1990 on compensation in excess of $203,067 (the average of $209,200 (B's 1990 compensation capped by the 1990 limit), $200,000 (B's 1989 compensation capped by the 1989 limit), and $200,000 (B's 1988 compensation)). In calculating plan benefits in 1990, the 1990 annual compensation limit applies to the 1990 year only. The 1989 year is capped by the 1989 annual compensation limit. Each year used in the average, including the 1988 plan year, is subject to the applicable annual compensation limit for that year.

Example 3. Assume the same facts as *Example 1*, except that Employee B's high 3 consecutive years' compensation prior to the application of the limits is $230,000 (1989), $220,000 (1988), and $210,000 (1987). To satisfy this paragraph (b), Plan X cannot base plan benefits for Employee B in 1989 on compensation in excess of $200,000 (the average of $200,000 (B's 1989 compensation capped by the 1989 annual compensation limit), $200,000 (B's 1988 compensation capped by the $200,000 annual compensation limit applicable to all years before 1989), and $200,000 (B's 1987 compensation capped by the $200,000 annual compensation limit applicable to all years before 1989).

Example 4. Plan Z is a defined benefit plan that bases benefits on an employee's high consecutive 36 months of compensation ending within the plan year. Employee C's high 36 months are the period September 1989 to August 1992, in which Employee C earned $50,000 in each month. The annual compensation limit is $200,000, $209,200, and $222,220 in 1989, 1990, and 1991, respectively. To satisfy this paragraph (b), Plan Z cannot base plan benefits for Employee C on compensation in excess of $210,473 for the 1992 plan year. This amount is determined by applying the applicable annual compensation limit to compensation for each of the three 12-consecutive-month periods. The September 1989 to August 1990 period is capped by the annual compensation limit of $200,000 for 1989, the September 1990 to August 1991 period is capped by the annual compensation limit of $209,200 for 1990, and the September 1991 to August 1992 period is capped by the annual compensation limit of $222,220 for 1991. The average of these capped amounts is the annual compensation limit for determining benefits for the 1992 year.

Example 5. (a) Employer X is a partnership. Employer X maintains Plan M, a profit-sharing plan that provides for an annual allocation of employer contributions of 15 percent of plan year compensation for employees other than self-employed individuals, and 13.0435 percent of plan year compensation for self-employed individuals. In order to satisfy section 401(a)(17), the plan provides that the plan year compensation used in determining the allocation of employer contributions for each employee may not exceed the annual limit in effect for the plan year. The plan year of Plan M is the calendar year. Plan M defines compensation for self-employed individuals (employees within the meaning of section 401(c)(1)) as the self-employed individual's net profit from self-employment attributable to Employer X minus the amount of the self-employed individual's deduction under section 164(f) for one-half of self-employment taxes. Plan M defines compensation for all other employees as wages within the meaning of section 3401(a). Employee A and Employee B are partners of Employer X and thus are self-employed individuals. Neither Employee A nor Employee B owns an interest in any other business. For the 1991 calendar year, Employee A has net profit from self-employment of $150,000, and Employee B has net profit from self-employment of $230,000. The deduction for each employee under section 164(f) for one-half of self-employment taxes is $5,123.

(b) The plan year compensation under the plan formula for Employee A is $144,877 ($150,000 minus $5,123). The allocation of employer contributions under the plan allocation formula for 1991 for Employee A is $18,897 ($144,877 (Employee B's plan year compensation for 1991) multiplied by 13.0435%). The plan year compensation under the plan formula before application of the annual limit under section 401(a)(17) for Employee B is $224,877 ($230,000 minus $5,123). After application of the annual limit, the plan year compensation for the 1991 plan year for Employee A is $222,220 (the annual limit for 1991). Therefore, the allocation of employer contributions under the plan allocation formula for 1991 for Employee B is $28,985 ($222,220 (Employee B's plan year compensation after application of the annual limit for 1991) multiplied by 13.0435%).

Example 6. The facts are the same as in *Example 5*, except that Plan M provides that plan year compensation for self-employed individuals is defined as earned income within the meaning of section 401(c)(2) attributable to Employer X. In addition, Plan M provides for an annual allocation of employer contributions of 15 percent of plan year compensation for all employees in the plan. The net profit from self-employment for Employee A and the net profit from self-employment for Employee B are the same as provided in *Example 5*. However, the earned income of Employee A determined in accordance with section 401(c)(2) is $125,980 ($150,000 minus $5,123 minus $18,897). The earned income of Employee B determined in accordance with section 401(c)(2) is $195,545 ($230,000 minus $5,123 minus $29,332). Therefore, the allocation of employer contributions under the plan allocation formula for 1991 for Employee A is $18,897 ($125,980 (Employee A's plan year compensation for 1991) multiplied by 15%). Employee B's earned income for 1991 does

not exceed the 1991 annual limit of $222,220. Therefore, the allocation of employer contributions under the plan allocation formula for 1991 for Employee B is $29,332 ($195,545 (Employee B's plan year compensation for 1991) multiplied by 15%).

(c) *Limit on compensation for nondiscrimination rules*—(1) *General rule.* The annual compensation limit applies for purposes of applying the nondiscrimination rules under sections 401(a)(4), 401(a)(5), 401(l), 401(k)(3), 401(m)(2), 403(b)(12), and 410(b)(2). The limit also applies in determining whether an alternative method of determining compensation impermissibly discriminates under section 414(s)(3). This paragraph (c) provides rules for applying the annual compensation limit for these purposes. For purposes of this paragraph (c), *compensation* means the compensation used in applying the applicable nondiscrimination rule.

(2) *Plan-year-by-plan-year requirement.* For purposes of this paragraph (c), when applying an applicable nondiscrimination rule for a plan year, the compensation for each plan year taken into account is limited to the applicable annual compensation limit in effect for that year, and an employee's compensation for that plan year in excess of the limit is disregarded. Thus, if the nondiscrimination provision is applied on the basis of compensation determined over a period of more than one year (for example, high average compensation) the annual compensation limit in effect for each of the plan years used in the average applies to the respective plan year's compensation taken into account in determining the average.

(3) *Plan-by-plan limit.* For purposes of this paragraph (c), the annual limit applies separately to each plan (or group of plans treated as a single plan) of an employer for purposes of the applicable nondiscrimination requirement. For this purpose, the plans included in the testing group taken into account in determining whether the average benefit percentage test of § 1.410(b)-5 is satisfied are generally treated as a single plan.

(4) *Application of limit to a plan year.* The rules provided in paragraph (b)(3) of this section regarding the application of the limit to a plan year apply for purposes of this paragraph (c).

(5) *Limits on multiple employer and multiemployer plans.* The rule provided in paragraph (b)(4) of this section regarding the application of the limit to multiple employer and multiemployer plans applies for purposes of this paragraph (c).

(d) *Effective date*—(1) *Statutory effective date*—(i) *General rule.* Except as otherwise provided in this paragraph (d)(1), section 401(a)(17) applies to allocations and benefit accruals for plan years beginning on or after January 1, 1989.

(ii) *Exception for collectively bargained plans.* In the case of a plan maintained pursuant to 1 or more collective bargaining agreements between employee representatives and 1 or more employers ratified before March 1, 1986, section 401(a)(17) applies to allocations and benefit accruals for plan years beginning on or after the earlier of—

(A) January 1, 1991, or

(B) The later of January 1, 1989, or the date on which the last of the collective bargaining agreements terminates (determined without regard to any extension or renegotiation of any agreement occurring on or after March 1, 1986). For purposes of this paragraph (d)(2)(ii), any extension or renegotiation of a collective bargaining agreement, which extension or renegotiation is ratified after February 28, 1986, is disregarded in determining the date on which the agreement terminates.

(iii) *Exception for governmental plans.* Section 401(a)(17) is considered satisfied for plan years beginning before January 1, 1993, in the case of governmental plans described in section 414(d).

(2) *Regulatory effective date.* This § 1.401(a)(17)-1 applies to plan years beginning on or after January 1, 1991. For plan years beginning before that date, and on or after the first day of the first plan year to which section 401(a)(17) applies, a plan must be operated in accordance with a reasonable, good faith interpretation of section 401(a)(17). Whether a plan is operated in accordance with a reasonable, good faith interpretation of section 401(a)(17) is generally determined based on all the relevant facts and circumstances, including the extent to which an employer has resolved unclear issues in its favor. A plan is deemed to be operated in accordance with a reasonable, good faith interpretation of section 401(a)(17) if it is operated in accordance with the terms of this section.

(3) *Pre-effective date benefits*—(i) *In general.* For purposes of this paragraph (d), allocations or benefits accrued under a plan for plan years beginning before the statutory effective date applicable to the plan under paragraph (d)(1) of this section are not subject to the annual compensation limits.

(ii) *Allocations for years before the effective date.* Allocations for plan years beginning before the statutory effective date applicable to the plan under paragraph (d)(1) of this section include all amounts allocated or treated as allocated to the account of an employee for those plan years, including employer contributions, forfeitures, elective contributions, employee contributions, and matching contributions, plus earnings, expenses, gains, and losses attributable to those amounts. In the case of a defined contribution plan subject to section 412, the amount of employer contributions treated as allocated for the plan year is the amount of employer contributions required to be allocated under the plan to the employee's account for the plan year, even if all or part of any required contribution is not actually made.

(iii) *Benefits accrued for years before the effective date.* The benefits accrued for plan years beginning before the statutory effective date applicable to the plan under paragraph (d)(1) of this section by any employee are the employee's benefits accrued under the plan, determined as if those benefits had been frozen (as defined in § 1.401(a)(4)-12) as of the last day of the last plan year beginning before the statutory effective date, disregarding any amendments adopted after the date that the employee's benefits under the plan are treated as frozen. Thus, benefits accrued for those plan years do not include any benefits accrued under an amendment granting past service that is adopted after the date that the employee's benefits under the plan must be treated as frozen. Nonetheless, service for the employer after that date continues to be taken into account for purposes of determining an employee's nonforfeitable percentage and eligibility for benefits, rights, and features under the plan with respect to the benefits treated as frozen under this paragraph (d)(3)(iii).

(e) *Determination of post-effective-date accrued benefits*—(1) *In general.* The plan formula that is used to determine the amount of allocations or benefit accruals for plan years beginning on or after the statutory effective date must comply with section 401(a)(17). However, in determining whether an allocation or benefit accrual under the plan formula for plan years beginning on or after the statutory effective date satisfies section 401(a)(17), a plan is not required to take into account any allocations or benefit accruals described in paragraph (d)(3) of this section. This paragraph (e) provides rules for applying section 401(a)(17) in the case of section 401(a)(17) employees who accrue additional benefits in a plan year beginning on or after the statutory

effective date. Paragraph (e)(2) of this section contains definitions used in applying this paragraph (e). Paragraphs (e)(3) and (e)(4) of this section explain the application of the fresh-start rules in § 1.401(a)(4)–13 to the determination of the accrued benefits of section 401(a)(17) employees.

(2) *Definitions.* For purposes of this paragraph (e), the following definitions apply:

(i) *Statutory effective date* means the first day of the first plan year beginning on or after the statutory effective date applicable to the plan under paragraph (d)(1) of this section.

(ii) *Section 401(a)(17) employee* means an employee with accrued benefits in plan years beginning before the statutory effective date that were determined taking into account compensation that exceeded the annual compensation limit for any year.

(iii) *Section 401(a)(17) fresh-start date* means a fresh-start date as defined in § 1.401(a)(4)–12 not earlier than the last day of the last plan year beginning before the statutory effective date and not later than the last day of the last plan year beginning before January 1, 1992 (or January 1, 1993, in the case of governmental plans described in section 414(d)).

(iv) *Section 401(a)(17) frozen accrued benefit* means the accrued benefit for any section 401(a)(17) employee frozen (as defined in § 1.401(a)(4)–12) as of the last day of the last plan year beginning before the statutory effective date, determined in the same manner as provided in paragraph (d)(3)(iii) of this section.

(3) *Application of fresh-start rules*—(i) *General rule.* In order to satisfy section 401(a)(17), the plan must determine the accrued benefit of each section 401(a)(17) employee by applying the fresh-start rules in § 1.401(a)(4)–13(c). The fresh-start rules must be applied using a section 401(a)(17) fresh-start date and using the plan benefit formula after amendment to comply with section 401(a)(17) and this section as the formula applicable to benefit accruals in the current plan year.

(ii) *Fresh start for section 401(a)(17) employees only.* The fresh-start rules in § 1.401(a)(4)–13(c) may be applied in accordance with paragraph (e)(3)(i) of this section to determine the accrued benefits of all section 401(a)(17) employees in the plan but not the accrued benefit of other employees in the plan in lieu of applying the rules to determine the benefits of all employees in the plan as otherwise required under the consistency rule in § 1.401(a)(4)–13(c)(ii).

(iii) *Consistency rules in § 1.401(a)(4)–13 (c) and (d)*—(A) *General rule.* In applying the fresh-start rules of § 1.401(a)–13 (c) and (d) to section 401(a)(17) employees, the consistency rules of those sections govern, unless otherwise provided. Thus, for example, if the plan is using a fresh-start date applicable to all employees and not adjusting frozen accrued benefits under § 1.401(a)(4)–13(d) for employees other than section 401(a)(17) employees, frozen accrued benefits may not be adjusted for section 401(a)(17) employees after the fresh-start date under § 1.401(a)(4)–13(d) or this paragraph (e) either. Notwithstanding the foregoing, if the fresh-start rules provided in paragraph (e)(3)(i) of this section are applied to determine benefits of section 401(a)(17) employees only, the consistency rules in § 1.401(a)(4)–13 (c) and (d) are applied as if the section 401(a)(17) employees were the only employees in the plan. For example, if the fresh-start rules are applied using the section 401(a)(17) fresh-start date to determine benefits of section 401(a)(17) employees only, the same formula in § 1.401(a)(4)–(13) (c)(2), (c)(3), or (c)(4) must be applied to determine the accrued benefits of all section 401(a)(17) employees in the plan after the section 401(a)(17) fresh-start date.

(B) *Determination of adjusted accrued benefit.* If the fresh-start rules of § 1.401(a)(4)–13 (c) and (d) are applied to determine the benefits of all employees after a fresh-start date, the plan will not fail to satisfy the uniformity requirement of § 1.401(a)(4)–13(c)(5) merely because the plan makes the adjustment described in § 1.401(a)(4)–13 (d)(5) and (d)(6) to the frozen accrued benefits of employees who are not section 401(a)(17) employees, but does not make the adjustment to the frozen accrued benefits of section 401(a)(17) employees. In addition, the plan does not fail the uniformity requirement of § 1.401(a)(4)–13(c)(5) merely because the plan makes the adjustment described in § 1.401(a)(4)–13(d)(6) for section 401(a)(17) employees on the basis of the old compensation fraction (as required by paragraph (e)(4)(iii) of this section), but for employees who are not section 401(a)(17) employees on the basis of the new compensation fraction or the reconstructed compensation fraction.

(4) *Permitted adjustments to frozen accrued benefit of section 401(a)(17) employees*—(i) *General rule.* Except as otherwise provided in paragraphs (e)(4) (ii) and (iii) of this section, the rules in § 1.401(a)(4)–13(c)(5) permitting certain adjustments to frozen accrued benefits apply to section 401(a)(17) frozen accrued benefits.

(ii) *Optional forms of benefit.* After the section 401(a)(17) fresh-start date, a plan may be amended to provide a new optional form of benefit or to make an optional form available with respect to the section 401(a)(17) frozen accrued benefit provided that the optional form of benefit is not subsidized. An optional form is not subsidized only if it is the actuarial equivalent of the employee's accrued benefit using a reasonable interest rate and reasonable mortality assumptions. A standard interest rate and a standard mortality table (as defined in § 1.401(a)(4)–12) are deemed to be reasonable for this purpose.

(iii) *Determining adjusted section 401(a)(17) accrued benefit*—(A) *Fresh start as of statutory effective date.* For purposes of § 1.401(a)(4)–13(d), if the plan uses a section 401(a)(17) fresh-start date that is the last day of the last plan year beginning before the statutory effective date, the section 401(a)(17) frozen accrued benefit of each section 401(a)(17) employee may be adjusted in accordance with § 1.401(a)(4)–13(d)(6), if applicable, with the following modifications—

(*1*) The adjustment must be made using the old compensation fraction described in § 1.401(a)(4)–13(d)(6)(i)(A).

(*2*) The numerator of the old compensation fraction in § 1.401(a)(4)–13(d)(6)(i)(A) must be determined after applying the section 401(a)(17) compensation limit for the current plan year, and the denominator of the fraction must be determined as of the last day of the last year before the statutory effective date without regard to the section 401(a)(17) compensation limit.

(B) *Fresh starts after statutory effective date.* For purposes of § 1.401(a)(4)–13(d), if the plan uses a section 401(a)(17) fresh-start date or any other fresh-start date that is later than the last day of the plan year beginning before the statutory effective date, the adjusted accrued benefit (within the meaning of §§ 1.401(a)(4)–13(d)) for each section 401(a)(17) employee must be determined after the fresh-start date under the following bifurcated method—

(*1*) Determine the section 401(a)(17) employee's frozen accrued benefit in accordance with § 1.401(a)(4)–13(c)(1)(i) as of the fresh-start date.

(*2*) Determine the employee's section 401(a)(17) frozen accrued benefit adjusted in accordance with paragraph (e)(4)(iii)(A) of this section, if applicable, through the fresh-start date.

(*3*) Subtract from the frozen accrued benefit determined in paragraph

(e)(4)(iii)(B)(*1*) of this section the employee's adjusted section 401(a)(17) frozen accrued benefit determined in paragraph (e)(4)(iii)(B)(*2*) of this section. This is the employee's post-effective date frozen accrued benefit.

(*4*) Adjust the employee's post-effective date frozen accrued benefit in accordance with § 1.401(a)(4)–13(d)(6) under the normal rules applicable to employees who are not section 401(a)(17) employees. Thus, in determining the numerator and the denominator of the fraction used to adjust the post-effective date frozen accrued benefit, the annual compensation limit under section 401(a)(17) applies.

(*5*) Adjust the section 401(a)(17) frozen accrued benefit in paragraph (e)(4)(iii)(B)(*2*) of this section in accordance with § 1.401(a)(4)–13(d)(6), as modified by paragraph (e)(4)(iii)(a) of this section.

(*6*) The adjusted accrued benefit of the section 401(a)(17) employee after the fresh-start date is the sum of the amounts in paragraphs (e)(4)(iii)(B)(*4*) and (*5*) of this section.

(5) *Examples.* The following examples illustrate the rules in this paragraph (e).

Example 1. (a) Plan Y is a calendar year defined benefit plan providing an annual benefit for each year of service equal to 2 percent of compensation average over an employee's high 3 consecutive years' compensation. Plan Y is not a collectively bargained plan or a governmental plan. As of the close of the last plan year beginning before January 1, 1989 (i.e., the 1988 plan year), Employee A, with 5 years of service, had accrued a benefit of $25,000 which equals 10 percent (2 percent multiplied by 5 years of service) of average compensation of $250,000. Effective for plan years after December 31, 1988, Plan Y is amended to provide that in determining an employee's benefit, compensation taken into account is subject to the annual compensation limit under section 401(a)(17), and that, for section 401(a)(17) employees, the employee's accrued benefit is the greater of the employee's benefit under the plan formula after the plan formula is amended to comply with section 401(a)(17) as applied to the employee's total years of service, and the employee's accrued benefit as of December 31, 1988, determined as though the employee terminated employment on the date without regard to any plan amendments after that date. Employer X decides not to amend Plan Y to provide for the adjustments permitted under § 1.401(a)(4)–13(d)(6) to the accrued benefit of section 401(a)(17) employees as of December 31, 1988.

(b) Under Plan Y's formula, Employee A's accrued benefit at the end of 1989 is $25,000, which is the greater of Employee A's accrued benefit as of the last day of the 1988 plan year ($25,000), and $24,000, which is Employee A's benefit based on the plan's formula applied to Employee A's total years of service ($200,000 multiplied by (2 percent multiplied by 6 years of service)). The formula of Plan Y applicable to section 401(a)(17) employees for calculating their accrued benefits for years after the section 401(a)(17) fresh-start date is the formula in § 1.401(a)–13(c)(3) (formula with wear-away). The fresh-start formula is applied using a benefit formula that satisfies section 401(a)(17) and this section and is applied using December 31, 1988, as the section (401(a)(17) fresh-start date. Thus, Plan Y, as amended, satisfies paragraph (e)(3)(i) of this section.

Example 2. Assume the same facts as in *Example 1*, except that the plan formula provides that effective January 1, 1989, for section 401(a)(17) employees, the employee's benefit will equal the sum of an employee's accrued benefit as of December 31, 1988 (determined as though he terminated employment on that date and without regard to any amendments after that date), and 2 percent of compensation average over an employee's high 3 consecutive years' compensation times years of service taking into account only years of service after December 31, 1988. Thus, under Plan Y's formula, Employee A's accrued benefit at the end of 1989 is $29,000, which is equal to the sum of $25,000 (Employee A's accrued benefit at the end of 1988) plus $4,000 ($200,000 multiplied by (2 percent multiplied by 1 year of service)). The formula of Plan Y applicable to section 401(a)(17) employees for calculating their accrued benefits for years after the section 401(a)(17) fresh-start date is the formula in § 1.401(a)–13(c)(2) (formula without wear-away). The fresh-start formula is applied using a benefit formula for the 1989 plan year that satisfies section 401(a)(17) and this section and is applied using December 31, 1988, as the section 401(a)(17) fresh-start date. Thus, Plan Y, as amended, satisfied paragraph (e)(1) of this section.

Example 3. Assume the same facts as in *Example 1*, except that the plan formula provides that effective January 1, 1989, an employee's benefit equals the greater of the plan formulas in *Example 1* and *Example 2*. Thus, under Plan Y's formula, Employee A's accrued benefit at the end of 1989 is $29,000, which is equal to the greater of $25,000 and $29,000. The formula of Plan Y applicable to section 401(a)(17) employees for calculating their accrued benefits for years after the section 401(a)(17) fresh-start date is the formula in § 1.401(a)–13(c)(4) (formula with extended wear-away). The fresh-start formula is applied using a benefit formula for the 1989 plan year that satisfies section 401(a)(17) and this section and is applied using December 31, 1988, as the section 401(a)(17) fresh-start date. Thus, Plan Y, as amended, satisfies paragraph (e)(1) of this section.

Example 4. Assume the same facts as in *Example 3.* As of December 31, 1995, Employee A's average annual compensation under the plan compensation formula, disregarding the amendment to comply with section 401(a)(17) is equal to $300,000. Assume that the annual compensation limit is adjusted to $260,000, $270,000, and $280,000 for plan years beginning on or after January 1, 1993, 1994, and 1995, respectively. The compensation that may be taken into account for the 1995 plan year cannot exceed $270,000 (the average of $260,000, $270,000, and $280,000). Therefore, at the end of December 31, 1995, the amount using formula with wear-away would be $64,800 ($270,000 multiplied by (2 percent multiplied by 12 years of service)). The amount using formula without wear-away would be $62,800 which is equal to $25,000 (Employee A's section 401(a)(17) frozen accrued benefit) plus $37,800 ($270,000 multiplied by (2 percent multiplied by 7 years of service)). Thus, because Employee A's accrued benefit is being determined using formula with extended wear-away, the accrued benefit is equal to the greater of the two amounts. Employee A's accrued benefit at the end of 1995 is $64,800.

Example 5. (a) Assume the same facts as in *Example 4*, except that Plan Y satisfies § 1.401(a)(4)–13 (d)(2) through (d)(5) and that amendment to Plan Y effective for plan years beginning after December 31, 1988, also provided for adjustments in accordance with § 1.401(a)(4)–13(d)(6) to the frozen accrued benefit of section 401(a)(17) employees. No other fresh-start date applies to the calculation of benefits under Plan Y.

(b) The numerator of Employee A's old compensation fraction is $270,000 (the average of Employee A's annual compensation for 1993, 1994, and 1995, as limited by the respective annual limit for each of those years). The denominator of Employee A's old compensation fraction determined in accordance with the modification in paragraph (e)(4)(iii)(A)(*2*) of this section is $250,000 (the average of Employee A's high 3 consecutive year's annual compensation as of December 31, 1988, determined without regard to section 401(a)(17)). Therefore, Employee A's old compensation fraction is $270,000/$250,000. Employee A's adjusted section 401(a)(17) frozen accrued benefit adjusted through December 31, 1995, is $27,000 (($270,000 divided by $250,000) multiplied by $25,000). Therefore, the accrued benefit using the formula without wear-away would also be $64,800 ($27,000 (Employee A's adjusted section 401(a)(17) accrued benefit) plus $37,800 ($270,000 multiplied by (2 percent multiplied by 7 years of service))).

Example 6. (a) Assume the same facts as in *Example 2* (example illustrating formula without wear-away), except that as of December 31, 1991, Employer X amends Plan Y to increase benefits to 3 percent of each employee's average annual compensation using the average of the 5 consecutive calendar years out of the last 10 consecutive calendar years during which the average of the employee's compensation is the highest. (After amendment, Plan Y satisfies the requirements of § 1.401(a)(4)–3(b)(3).) Employer X applies the fresh-start rules in § 1.401(a)(4)–13(c) using the formula in § 1.401(a)(4)–13(c)(2) (formula without wear-away) to all employees. Plan Y satisfies the requirements of § 1.401(a)(4)–13(d) (2) through (5) and the amendment increasing benefits also provides for the frozen accrued benefit of each employee to be adjusted in accordance with § 1.401(a)(4)–13(d)(6) using the new compensation fraction in § 1.40(a)(4)–13(d)(6)(i)(B). In applying the new

compensation formula, Plan Y provides that average annual compensation will be determined using the plan's compensation formula. However, Plan Y provides that the adjusted accrued benefits of section 401(a)(17) employees are to be determined using the bifurcated method in paragraph (e)(4)(iii)(B) of this section. Employee A's calendar year compensation exceeds the section 401(a)(17) limit for every year through 1992. Assume that the annual limit for 1992 is $245,000.

(b) Employee's A's frozen accrued benefit as of December 31, 1991, determined under the fresh-start rules of § 1.401(a)(4)-13(c)(2) (formula without wear-away) is $37,628 ($25,000 plus $12,628 (($210,473 (the average of $200,000, $209,200, and $222,220) multiplied by 2 percent) multiplied by 3 years)). Employee A's frozen accrued benefit adjusted through December 31, 1992, determined in accordance with paragraph (e)(4)(iii)(B) of this section calculated as follows:

(1) Employee A's post-effective date frozen accrued benefit $12,628 ((Employee A's frozen accrued benefit as of December 31, 1991) ($37,628) minus (Employee A's section 401(a)(17) frozen accrued benefit ($25,000))).

(2) The numerator of Employee A's new compensation fraction is $215,284 (the average of $200,000, $200,000, $209,200, $222,220, and $245,000). The denominator of Employee A's new compensation fraction is $206,284 (the average $200,000, $200,000, $200,000, $209,200, and $222,220).

(3) Employee A's post-effective date frozen accrued benefit adjusted through December 31, 1992, is $13,179 (($215,284 divided by $206,284) multiplied by $12,628).

(4) Employee A's section 401(a)(17) frozen accrued benefit adjusted through December 31, 1992, remains $25,000. The old compensation fraction determined in accordance with the modification in paragraph (e)(4)(iii)(A) of this section is less than one ($225,473 (the average of $209,200, $222,200, and $245,000) divided by $250,000).

(5) Employee A's adjusted accrued benefit as of December 31, 1992, equals $38,179 (the sum of the amounts from paragraphs (b)(3) and (b)(4) of the *Example*).

(f) *Additional rules.* The Commissioner may, in revenue rulings, notices, and other guidance of general applicability, provide any additional rules that may be necessary or appropriate concerning the annual limits on compensation under section 401(a)(17).

Approved: August 30, 1991.

Fred T. Goldberg, Jr.,

Commissioner of Internal Revenue.

Kenneth W. Gideon,

Assistant Secretary of the Treasury.

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26 CFR Part 1

[T.D. 8359]

RIN 1545-AI86

Permitted Disparity With Respect to Benefits and Contributions

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the permitted disparity in employer contributions to, and employer-derived benefits under, qualified plans. They reflect changes to the applicable tax law made by the Tax Reform Act of 1986 and the Technical and Miscellaneous Revenue Act of 1988. These regulations provide guidance needed to comply with the law and affect sponsors of, and participants in, tax-qualified retirement plans.

EFFECTIVE DATE: These regulations are effective for plan years beginning after December 31, 1988, and applied to those plan years except as set forth in § 1.401(l)-6.

FOR FURTHER INFORMATION CONTACT: Patricia McDermott at 202-377-9372 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

Background

Proposed regulations under section 401(l) were published in the **Federal Register** on November 15, 1988 (53 FR 45917). The November 1988 proposed regulations were supplemented and modified by proposed regulations published in the **Federal Register** on May 14, 1990 (55 FR 19947), and September 14, 1990 (55 FR 37888).

Written comments were received from the public on the proposed regulations. In addition, public hearings on the proposed regulations were held June 29, 1989, and September 26, 27, and 28, 1990. After consideration of all the written comments received and the statements made at the hearings, the proposed regulations under section 401(l) are adopted as modified by this Treasury Decision.

Explanation of Provisions

Organization of Regulation

These final regulations have been generally modified to reflect final regulations under section 401(a)(4). They have also been reorganized in certain respects to improve their readability. Other changes in style and organization have been made in order to improve, clarify and resolve areas that commentators noted as ambiguous.

1. Coordination With Final Section 401(a)(4) Regulations

Regulations under section 401(l) were proposed prior to the issuance of proposed regulations under section 401(a)(4). Because these final regulations have been developed in conjunction with the final section 401(a)(4) regulations that are being issued simultaneously, it has been possible to eliminate unnecessary duplication and provide for better coordination of the rules under the two sections. For example, some provisions contained in proposed regulations under section 401(l) apply to plans generally under section 401(a)(4). To the extent possible, these provisions have been moved to the regulations under section 401(a)(4), while retaining a reference in the section 401(l) regulations.

Certain definitions in the permitted disparity regulations now cross-refer to the definitions in the final regulations under sections 401(a)(4) and 410(b). For example, terms such as "average annual compensation," "employee," "plan year compensation," and "plan" are defined in § 1.401(a)(4)-12. In response to comments, the concept of "plan" under section 401(a)(4), including aggregated plans and component plans, has been extended for purposes of section 401(l). Thus, although a plan as a whole might not satisfy section 401(l), the plan may be restructured into component plans under § 1.401(a)(4)-9(c), some or all of which satisfy section 401(l) and qualify for safe harbor treatment under section 401(a)(4).

Some of the deemed uniformity rules originally contained in the proposed regulations under section 401(l), such as the multiple formula rule, have been consolidated with the safe harbor uniformity rules in §§ 1.401(a)(4)-2(b) and 1.401(a)(4)-3(b). In addition, the final regulations under section 401(l) now provide that the special rules under the final section 401(a)(4) regulations enumerating those plan provisions that will not cause a plan to be nonuniform under the safe harbors apply also for purposes of section 401(l), thus allowing the same flexibility in designing safe harbor plans under section 401(l) as under section 401(a)(4). For example, a plan may limit each employee's benefit to a specified dollar amount without violating the uniformity rule.

Special rules for target benefit plans and certain insurance contract plans (section 412(i) plans) that use the permitted disparity rules, originally contained in the proposed regulations under section 401(l), are now contained

in §§ 1.401(a)(4)–8(b)(3) and 1.401(a)(4)–3(b)(7), respectively.

Safe harbor rules for cash balance plans have also been added to the final section 401(a)(4) regulations. Many comments on the section 401(l) proposed regulations requested that cash balance plans, which are a hybrid type of defined benefit plan, be allowed to use the permitted disparity rules for defined contribution plans. They stated that the permitted disparity rules for defined benefit plans were incompatible with the basic design of a cash balance plan. In response to those comments, the cash balance plan safe harbor adopted in the final section 401(a)(4) regulations allows a plan to satisfy section 401(l) on the basis of the defined contribution plan rules.

The rules in the proposed regulations under section 401(l) relating to employee contributions under a defined benefit plan have been consolidated with the regulations under section 401(a)(4) to provide a single set of rules under § 1.401(a)(4)–6. The preamble to the final section 401(a)(4) regulations discusses changes in the employee contribution rules under the final regulations.

Finally, the transition rules in the proposed regulations under both section 401(l) and section 401(a)(4) provided rules for determining employees' accrued benefits after amendment of a defined benefit plan to comply with the Tax Reform Act of 1986 ("TRA '86") and rules relating to increases in an employee's benefit accrued before the effective date of the new rules under section 401(l) and section 401(a)(4) to reflect pay increases after the effective date. These rules have been combined into a single set of "fresh start" rules under § 1.401(a)(4)–13(c), with a single set of examples, that apply to plan amendments made to comply with TRA '86. In addition, under the final regulations, the fresh-start rules will also apply to later plan amendments, including an amendment to bring the plan within one of the design-based safe harbors under the final section 401(a)(4) regulations. Thus, an employer that chooses not comply to with section 401(l) as of the original effective date, now has the option of amending the plan to comply with section 401(l) at a later date. Since complying with section 401(l) in form is a prerequisite to satisfying the nondiscriminatory amounts test under the final section 401(a)(4) regulations on a safe harbor basis, this will permit use of the safe harbors by additional plans.

The rules for increasing a pre-effective date accrued benefit to reflect pay increases after the effective date have been consolidated in § 1.401(a)(4)–13(d). The proposed regulations allowed increases in pre-effective date accrued benefits under a plan using section 401(l) only if the plan satisfied section 401(l) as of the 1989 plan year. The final regulations remove that restriction, allowing the increases for any plan that satisfies section 401(l) as of the 1992 plan year, the effective date of the final regulations under section 401(a)(4).

2. Reorganization of the Final Section 401(l) Regulations

The final regulations under section 401(l) have also been reorganized to eliminate unnecessary internal duplication in order to improve their readability. For example, the proposed regulations contained separate rules for defined benefit excess plans and for defined benefit offset plans. The two sets of rules have been combined in the final regulations into a single set of rules that apply to both types of plans. Only in those cases where in different rule applies to each type of plan has a separate rule been set forth. The defined contribution plan rules have also been reorganized in a parallel manner.

New terms have been added to the definitions in § 1.401(l)–1(c) to make a single set of rules possible. For offset plans, the new terms "gross benefit percentage," "offset percentage," and "offset level" serve functions similar to the defined benefit excess plan terms "excess benefit percentage," "base benefit percentage," and "integration level." Another new term, "disparity," means, in the case of an excess plan, the amount by which the excess percentage exceeds the base percentage and means, in the case of an offset plan, the offset percentage. Except as discussed below, use of those new terms has not generally modified the substance of the rules.

The final regulations have also been revised to add the amendments made by Notice 89–70, 1989–1 C.B. 730. Those amendments generally expanded the proposed regulations in response to comments by providing more flexibility in determining integration (or offset) levels, covered compensation, average annual compensation, and early retirement reductions. Notice 89–70 also required that, in the case of early retirement under an offset plan, the rate of the gross benefit be reduced as well as the rate of the offset.

Finally, comments on the proposed regulations under section 401(l) requested clarification of the permitted disparity rules, particularly in the form of examples. Thus, a number of examples have been added to the regulations at various points to illustrate their application.

Section 401(l) Permitted Disparity

1. Plans Not Eligible To Use Section 401(l)

The proposed regulations under section 401(l) provided that section 401(l) does not apply to a plan maintained by an employer not subject to the tax under section 311(a) (the Federal Insurance Contributions Act or "FICA") or section 3221 (the Railroad Retirement Tax Act or "RRTA"). Similarly, the proposed regulations provided that section 401(l) does not apply to an employee stock ownership plan. In addition, the proposed regulations under section 401(a)(4) indicated that section 401(l) does not apply to contributions subject to section 401 (k) or (m). The final regulations under section 401(l) make it clear that disparity is not permitted with respect to elective contributions under a qualified cash or deferred arrangement, or with respect to employee or matching contributions, as those terms are defined under the final section 401 (k) and (m) regulations. Nor is disparity permitted with respect to contributions to a simplified employee pension made under a salary reduction arrangement described in section 408(k)(6).

Under section 312(b)(7), the FICA (and the tax under section 3111(a)) generally does not apply to service performed in the employ of a state, a political subdivision of a state, or an instrumentality of a state or political subdivision. Section 401(l) therefore does not apply to a plan maintained by a state or local government employer not subject to the tax under section 3111(a). Comments indicated that there was some confusion on this provision and requested that the final regulations extend section 401(l) to a state or local government employer that makes social security contributions under an agreement with the Social Security Administration under section 218 of the Social Security Act (a "218 agreement"). This was not necessary because section 3121(b)(7)(E) provides that employment for FICA purposes includes service performed for an employer covered by a 218 agreement. Thus, that employer is subject to the tax under section 3111(a) and is eligible to use the permitted disparity rules under section 401(l).

The final regulations clarify that, for purposes of section 401(l), an individual subject to the tax on self-employment income under section 1401 ("SECA") is deemed to be subject to the tax under section 3111(a). The final regulations also allow an employer not to provide disparity in contributions or benefits for an employee not covered by FICA,

RRTA, or SECA by deeming disparity for that employee to be uniform.

2. Permitted Disparity Under Defined Contribution Plans

Few changes to the disparity rules for defined contribution plans have been made in the final regulations under section 401(l). As permitted under Notice 89–70, a defined contribution plan may use an integration level below the taxable wage base and make specified adjustments in the disparity provided under the plan. Final regulations also allow a plan that has a short plan year and bases allocations on employees' compensation for that short plan year to pro-rate the integration level for the year.

The proposed regulations under section 401(l) required a defined contribution plan to provide uniform disparity for all employees. In contrast, the safe harbor rules under § 1.401(a)(4)–2(b) of the proposed section 401(a)(4) regulations specifically required a plan relying on section 401(l) to use the same base and excess contribution percentages for all employees. Because that requirement directly relates to section 401(l), the uniformity requirement under section 401(l) has been revised to require the plan to use same base and excess contribution percentages for all employees. The final regulations also allow disparity to be adjusted for an employee who has reached the cumulative disparity limit without violating the uniformity requirement.

The maximum excess allowance for a defined contribution plan is the lesser of (1) the base contribution percentage or (2) the greater of (a) 5.7 percent or (b) the portion of the tax under section 3111(a) that is attributable to "old-age" or retirement benefits. A number of practitioners have contacted the Service to ask for the current rate of the retirement portion of the tax under section 3111(a). At this point the retirement portion of the tax is well below 5.7 percent and is not expected to exceed 5.7 percent for many years. When it does exceed 5.7 percent, thus increasing the maximum excess allowance, the Commissioner will publish the new rate.

3. Permitted Disparity for Defined Benefit Plans

a. Uniform and Maximum Disparity

The proposed regulations under section 401(l) required that the disparity provided under a defined benefit plan be uniform for all employees and that it not exceed the maximum permitted disparity. In response to comments, final regulations clarify those requirements and revise them to provide greater flexibility to accommodate existing plan designs.

The final regulations make it clear that the permitted disparity limits and uniformity apply not just to the disparity provided in the plan formula, but also to the rate of disparity provided in the benefit that accrues. After publication of the supplemental proposed regulations under section 401(a)(4) in September 1990, it became apparent that some practitioners had not recognized that the permitted disparity limits and uniformity were affected by the accrual method used under the plan. Accordingly, the final regulations clarify this point.

The proposed regulations defined the maximum excess allowance and maximum offset allowance to include an annual disparity limit and a cumulative limit on the disparity provided for an employee's total years of service. The final regulations define maximum excess and offset allowance only as an annual limit. The cumulative limit has been added to the overall permitted disparity rules discussed below.

The proposed regulations also defined the maximum offset allowance as a dollar amount. New terminology for offset plans, as discussed above, has made it possible to define the maximum offset allowance, like the maximum excess allowance as a percentage.

The proposed regulations limited the offset to the lesser of (1) 0.75 percent of an employee's final average compensation up to covered compensation or (2) one-half of the benefit provided the employee with respect to average annual compensation up to covered compensation or, if lower, final average compensation up to covered compensation. Many commentators criticized the offset limit as inconsistent with the statutory limit of one-half the total benefit provided the employee. After consideration of those comments, the offset limit from the proposed regulations has been retained. One purpose of the legislative changes to the integration rules was to achieve parity between defined benefit excess plans and offset plans. To do this, it is necessary to define the maximum excess allowance in terms of the benefit provided with respect to the lesser of average annual compensation or final average compensation up to covered compensation.

Many commentators asked for clarification of the uniformity rules and expansion of the deemed uniformity rules. In response to those comments, a number of modifications have been made to the final regulations. Thus, the final regulations clarify that uniformity applies on the basis of employees with the same number of years of service, permitting a plan formula to vary the rate of disparity for employees with different years of service without violating uniformity. The proposed regulations also provided that a plan could adjust the rate of disparity for employees with different social security retirement ages without violating uniformity. The final regulations clarify that those adjustments must be made by increasing the base benefit percentage or reducing the offset percentage.

Commentators asked that the uniformity rules be revised to allow an offset plan to provide the same gross benefit for an employee's years of service up to 35, but to stop applying an offset after 25 years of service. Such a benefit design violates the 133⅓% accrual rule under section 411(b)(1)(B) and thus must be accrued fractionally. However, under the proposed regulations, fractional accrual of such a benefit would violate uniformity because the rate of disparity varies for employees with the same service. Thus, the final regulations deem such a plan design to be uniform. In order to provide parity, the deemed uniformity rule allows a similar plan design in a defined benefit excess plan. The deemed uniformity rules also allow a defined benefit plan, like a defined contribution plan, to adjust the disparity provided for an employee who has reached the cumulative disparity limit.

b. Reductions in the Permitted Disparity

Commentators suggested changes to the adjustments required in the rate of disparity if a plan uses an integration or offset level other than covered compensation or if benefits commerce at an age other than social security retirement age or in a form other than a straight life annuity. A number of those suggestions are reflected in final regulations.

Commentators asked that final regulations under section 401(a)(4) provide a safe harbor for "PIA offset plans." Under a PIA offset plan, benefits are offset by a portion of the employee's primary insurance amount ("PIA") under the Social Security Act. While the final section 401(a)(4) regulations do not include an explicit safe harbor for PIA offset plans, the final regulations under section 401(l) have been modified to allow certain reductions in the maximum permitted disparity to be determined on an individual basis, as described in more detail below. This change will enable plans to meet section 401(l), while providing benefit levels generally comparable to those under a

PIA offset formula. This, in turn, will allow the plans access to the safe harbors provided under the final section 401(a)(4) regulations.

Under the proposed section 401(l) regulations, the 0.75 percent maximum offset allowance prescribed in section 401(l)(4)(B) was required to be reduced equally for all employees if any employee's offset was based on final average compensation including amounts above covered compensation. The amount of the reduction was determined by comparing the highest amount of final average compensation that could be used in the calculation of the permitted disparity to the covered compensation of an employee currently at the social security retirement age, using a table in the regulations.

The reduction in the maximum offset allowance implemented section 401(l)(4)(C)(i)(II), which requires reductions in the maximum permitted disparity for any participant in an offset plan with final average compensation in excess of covered compensation. Commentators noted, however, that the approach taken in the proposed regulations reduced the permitted disparity factors for all employees, including those with final average compensation that did not exceed covered compensation. They suggested that the reduction was therefore inconsistent with section 401(l)(4)(C)(ii), which provides that the reduction for participants whose compensation exceeds covered compensation is to be based on the replacement ratio, or percentage of compensation replaced by the employer-derived portion of primary insurance amounts under the Social Security Act.

Two changes were suggested in the method for determining the reduced maximum offset allowance, which have been adopted in the final regulations. First, the reduction may be determined on an individual-by-individual basis by comparing each employee's final average compensation to the employee's covered compensation. Thus, the reduction will be made only with respect to employees with final average compensation in excess of covered compensation. Second, the reduction may be made by interpolating the adjustments in the table in the regulations. To retain parity, these changes also apply to defined benefit excess plans.

The use of individual disparity reductions under the final regulations will allow plans to define an offset that generally parallels replacement ratios for employer-provided social security benefits for each employee whose final average compensation exceeds covered compensation. At the same time, there will be no reduction in the permitted disparity for employees whose final average compensation does not exceed covered compensation. Plans designed in this manner should be able to approximate the replacement ratios for a PIA offset plan within the structure of section 401(l) and should therefore be able to use the existing safe harbors under the final section 401(a)(4) regulations.

Section 401(l) also requires the rate of permitted disparity to be reduced if benefits commerce before an employee's social security retirement age. This is because social security benefits before social security retirement age are paid at a reduced rate. Under the regulations, the disparity reduction is based on the age at which benefits commence, using tables under § 1.401(l)–3(e). Many commentators requested that the regulations be revised to take into account social security supplements. They noted a common distribution option that (1) provides an employee with a temporary supplement at early retirement, thus "filling in" the disparity in an employee's benefit until the employee begins collecting social security benefits, and (2) applies the permitted disparity rate applicable at the age the supplement ends, rather than the lower rate applicable at the age benefits originally commenced. That plan design allows an employee to delay commencement of social security benefits until social security retirement age (thus avoiding a reduction in social security benefits) and, in combination with social security benefits, provides an employee with a level stream of retirement income. The final section 401(l) regulations have been modified to allow such a plan design, provided the supplement is a "qualified social security supplement" as defined in § 1.401(a)(4)–12, by treating benefits as commencing at the age the supplement ends.

Because the maximum permitted disparity of 0.75 percent applies at social security retirement age, the disparity provided at normal retirement age of 65 must be reduced to 0.70 percent or 0.65 percent for employees with social security retirement ages of 66 or 67 respectively. For simplicity, some plans use a disparity rate of 0.65 percent for all employees at age 65, thus providing less than the maximum disparity for some employees. Commentators asked that such a plan be permitted to apply the early retirement reduction factors under section 401(l) on the basis of 0.65 percent without regard to the employees' different social security retirement ages. Accordingly, the final regulations provide a simplified table of early retirement factors for those plans.

Commentators also requested that a plan be permitted to provide an increased rate of disparity for an employee who continues working beyond social security retirement age to parallel increases under the Social Security Act if benefit commencement is delayed beyond social security retirement age. Final regulations allow a plan to increase the rate of disparity to reflect benefit commencement after social security retirement age. Increased disparity rates are included in the tables under § 1.401(l)–3(e) and are based on the increases under the Social Security Act.

Generally, section 401(l) requires the rate of disparity to be reduced if benefits are paid in a form more valuable than a straight life annuity. Commentators asked that a plan be permitted to provide cost-of-living increases after retirement without having to reduce the disparity provided in the benefit commencing at retirement. In response to these comments, the final regulations allow the permitted disparity limit to be applied at retirement without regard to automatic post-retirement cost-of-living increases that do not exceed the rate of increase in social security benefits for the period since retirement. Similarly, the final section 401(a)(4) regulations also contain a special safe harbor for ad hoc post-retirement cost-of-living increases under § 1.401(a)(4)–10.

4. Railroad Plans

Section 401(l) authorizes special permitted disparity rules for plans maintained by railroad employers to reflect differences between the social security and railroad retirement systems. The proposed regulations therefore provided special rules for railroad plans. Commentators asked that the final regulations provide (1) a special definition of "covered compensation" for railroad plans and (2) special rules for disparity reductions if a plan uses an integration level other than covered compensation or if benefits commence at an age other than social security retirement age.

Consistent with those requests, the final regulations in § 1.401(l)–4 define "railroad covered compensation" based on the compensation taken into account to determine benefits under the RRTA and allow disparity reductions based on a comparison of the integration level to railroad covered compensation. In addition, the final regulations provide special tables of reduced disparity

factors applicable to early retirement benefits under a railroad plan.

5. Overall Permitted Disparity

Because social security benefits are based on an employee's earnings for 35 years, section 401(l) limits the disparity that may be provided for an employee's total years of service to 35 times the annual permitted disparity. Section 401(l) also requires the publication of regulations preventing the multiple use of permitted disparity if an employee participates in more than one plan maintained by the employer. The proposed section 401(l) regulations therefore contained a cumulative limit on the disparity provided for an employee's total years of service and contained basic overall permitted disparity rules for an employee in more than one plan.

Since publication of the proposed regulations, questions from practitioners indicated that further guidance was needed. Accordingly, § 1.401(l)–5 of the final regulations provides great detail concerning the overall permitted disparity limits. Those rules deal with the disparity that may be provided if an employee benefits under more than one plan for the plan year (the "annual overall permitted disparity limit") and the disparity that may be provided for an employee's total years of service under all plans (the "cumulative overall permitted disparity limit"). The overall permitted disparity rules take into account plans that satisfy section 401(l) and plans that impute permitted disparity under § 1.401(a)(4)–7.

The annual overall permitted disparity limit requires the determination of a fraction based on the disparity provided an employee for the plan year under each plan. The annual overall permitted disparity limit is met if the sum of those fractions does not exceed one. The cumulative overall permitted disparity limit provides generally that the total of an employee's annual parity fractions for all years cannot exceed 35. A special rule deems the cumulative overall permitted disparity limit to be met if an employee has not benefited under a defined benefit plan for any year beginning after December 31, 1991. Special rules are also provided for plans that contain multiple formulas and plans under which benefits or allocations are offset by benefits or allocations under another plan.

6. Final Pay Plans Under Section 401(a)(5)(D)

Section 401(a)(5)(D) provides special rules for plans that limit an employee's benefit to the total of the employee's final pay and the employee's employer-provided primary insurance amount ("PIA"). The proposed section 401(a)(5)(D) regulations required that the employee's employer-provided PIA be reduced in accordance with § 1.401(l)–3(e) if benefits commence before an employee's social security retirement age. Commentators requested guidance on how the reductions in § 1.401(l)–3(e) are applied. Thus, the final regulations under § 1.401(a)(5)–1(e) provide that the reduction is made by multiplying the employee's employer-provided PIA by the ratio of the factor under § 1.401(l)–3(e) to 0.75.

7. Plans Maintained by More Than One Employer

Multiple employer plans must satisfy section 401(l) on an employer-by-employer basis rather than on the basis of participating employers in the aggregate. Any non-collectively bargained portion of a multiemployer plan is tested as a multiple employer plan. The consequences of failure to satisfy section 401(l) with respect to any component of this testing process may affect the plan for all participating employers. The final regulations, like the proposed regulations, do not provide an exception to this rule. However, where a multiemployer plan or a multiple employer plan fails to satisfy section 401(l), in a proper case, the Commissioner could treat the plan as satisfying section 401(l) for innocent employers by requiring corrective and remedial action with respect to the plan, such as allowing the withdrawal of an offending employer, allowing a disqualifying defect to be cured within a reasonable period of time after the plan administrator has or should have knowledge of the disqualifying event or was otherwise notified by the Service of the disqualifying defects, or requiring plan amendments to prevent future disqualifying events.

Special Analyses

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations and, therefore, a final Regulatory Flexibility analysis is not required. Pursuant to section 7805(f) of the Code, the proposed regulations published after November 20, 1988, were submitted to the Administrator of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal author of these regulations is Patricia McDermott of the Office of the Assistant Chief Counsel (Employee Benefits and Exempt Organizations), Internal Revenue Service. However, the personnel from other offices of the Treasury and the Service participated in their development.

List of Subjects in 26 CFR 1.401–0 Through 1.419A–2T

Bonds, Employee benefit plans, Income taxes, Pensions, Reporting and recordkeeping requirements, Securities, Trusts and trustees.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority for part 1 is amended by adding the following citations:

Authority: Sec. 7805, 68A Stat. 917; 26 U.S.C. 7805 * * * § 1.401(a)(5)–1 also issued under 26 U.S.C. 401(a)(5); §§ 1.401(l)–0 through 1.401(l)–6 also issued under 26 U.S.C. 401(l). * * *

Par. 2. Section 1.401–3 is amended by adding a new paragraph (e)(6) to read as follows:

§ 1.401–3 Requirements as to coverage.

* * * * *

(e) * * *

(6) This paragraph (e) does not apply to plan years beginning on or after January 1, 1989.

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Par. 3. A new § 1.401(a)(5)–1 is added to read as follows:

§ 1.401(a)(5)–1 Special rules relating to nondiscrimination requirements.

(a) *In general.* Section 401(a)(5) sets out certain provisions that will not of themselves be discriminatory within the meaning of section 410(b)(2)(A)(i) or section 401(a)(4). The exceptions specified in section 401(a)(5) are not an exclusive enumeration, but are merely a recital of provisions frequently encountered that will not of themselves constitute prohibited discrimination in contributions or benefits. See section 401(a)(4) and the regulations thereunder for the basic nondiscrimination rules. See § 1.410(b)–4 for the rule of section 410(b)(2)(A)(i) (relating to the nondiscriminatory classification test that is part of the minimum coverage

requirements) referred to in section 401(a)(5)(A). See paragraph (b) through (f) of this section for special rules used in applying the section 401(a)(4) nondiscrimination requirements under the remaining provisions of section 401(a)(5).

(b) *Salaried or clerical employees.* A plan does not fail to satisfy the nondiscrimination requirements of section 401(a)(4) merely because contributions or benefits provided under the plan are limited to salaried or clerical employees.

(c) *Uniform relationship to compensation.* A plan does not fail to satisfy the nondiscrimination requirements of section 401(a)(4) merely because the contributions or benefits of, or on behalf of, the employees under the plan bear a uniform relationship to the compensation (within the meaning of section 414(s)) of those employees.

(d) *Certain disparity permitted.* (1) Under section 401(a)(5)(C), a plan does not discriminate in favor of highly compensated employees (as defined in section 414(q)), within the meaning of section 401(a)(4), in the amount of employer-provided contributions or benefits solely because—

(i) In the case of a defined contribution plan, employer contributions allocated to the accounts of employees favor highly compensated employees in a manner permitted by section 401(l) (relating to permitted disparity in plan contributions and benefits), and

(ii) In the case of a defined plan, employer-provided benefits favor highly compensated employees in a manner permitted by section 401(l) (relating to permitted disparity in plan contributions and benefits).

See §§ 1.401(l)–1 through 1.401(l)–6 for rules under which a plan may satisfy section 401(l) for purposes of the safe harbors of §§ 1.401(a)(4)–2(b)(3) and 1.401(a)(4)–3(b).

(e) *Defined benefit plans integrated with social security*—(1) *In general.* Under section 401(a)(5)(D), a defined benefit plan does not discriminate in favor of highly compensated employees (as defined in section 414(q)) with respect to the amount of employer-provided contributions or benefits solely because the plan provides that, with respect to each employee, the employer-provided accrued retirement benefit under the plan is limited to the excess (if any) of—

(i) The employee's final pay from the employer, over

(ii) The employer-provided retirement benefit created under the Social Security Act and attributable to service by the employee for the employer.

(2) *Final pay.* For purposes of paragraph (e)(1)(i) of this section, an employee's final pay from the employer as of a plan year is the employee's compensation (as defined in section 414(q)(7)) for the year (ending with or within the 5-plan-year period ending with the plan year in which the employee terminates from employment with the employer) in which the employee receives the highest compensation from the employer. Notwithstanding the preceding sentence, final pay for each employee under the plan may be determined with reference to the 5-plan-year ending with the plan year before the plan year in which the employee terminates from employment with the employer. In determining an employee's final pay, the plan may specify any 12-month period (ending with or within the applicable 5-plan-year period) as a year provided the specified 12-month period is uniformly and consistently applied with respect to all employees. In determining an employee's final pay, compensation for any year in excess of the applicable limit under section 401(a)(17) for the year may not be taken into account.

(3) *Rules for determining amount of employer-provided social security retirement benefit.* For purposes of paragraph (e)(1)(ii) of this section, the following rules apply.

(i) The employer-provided retirement benefit on which any reduction or offset in the employee's accrued retirement benefit is based is limited solely to the employer-provided primary insurance amount payable under section 215 of the Social Security Act attributable to service by the employee for the employer.

(ii) The employer-provided primary insurance amount attributable to service by the employee for the employer is determined by multiplying the employer-provided portion of the employee's projected primary insurance amount by a fraction (not exceeding 1), the numerator of which is the employee's number of complete years of covered service for the employer under the Social Security Act, and the denominator of which is 35.

(4) *Projected primary insurance amount.* (i) As of a plan year, an employee's projected primary insurance amount is the primary insurance amount, determined as of the close of the plan year (the "determination date"), payable to the employee upon attainment of the employee's social security retirement age (as determined under section 415(b)(8)), assuming the employee's annual compensation from the employer that is treated as wages for purposes of the Social Security Act remains the same from the plan year until the employee's attainment of social security retirement age. With respect to service by the employee for the employer before the determination date, the actual compensation paid to the employee by the employer during all periods of service of the employee for the employer covered by the Social Security Act must be used in determining an employee's projected primary insurance amount. With respect to years before the employee's commencement of service for the employer, in determining the employee's projected primary insurance amount, it may be assumed that the employee received compensation in an amount computed by using a six-percent salary scale projected backwards from the determination date to the employee's 21st birthday. However, if the employee provides the employer with satisfactory evidence of the employee's actual past compensation for the prior years treated as wages under the Social Security Act at the time the compensation was earned and the actual past compensation results in a smaller projected primary insurance amount, the plan must use the actual past compensation. The plan administrator must give clear written notice to each employee of the employee's right to supply actual compensation history and of the financial consequences of failing to supply the history. The notice must be given each time the summary plan description is provided to the employee and must also be given upon the employee's separation from service. The notice must also state that the employee can obtain the actual compensation history from the Social Security Administration. In determining the employee's projected primary insurance amount, the employer may not take into account any compensation from any other employer while the employee is employed by the employer.

(ii) As of a plan year, the employer-provided portion of the employee's projected primary insurance amount under the Social Security Act is 50 percent of the employee's projected primary insurance amount (as determined under paragraph (e)(4)(i) of this section).

(5) *Employer-provided accrued retirement benefit.* For purposes of this section, the employee's employer-provided accrued retirement benefit as of a plan year is the employee's accrued retirement benefit under the plan (determined on an actual basis and not on a projected basis) attributable to employer contributions under the plan. With respect to plans that provide for

employee contributions, see section 411(c) for rules relating to the allocation of accrued benefits between employer contributions and employee contributions.

(6) *Additional rules.* (i) As of a plan year, paragraph (e)(1) of this section does not apply to the extent that its application would result in a decrease in an employee's accrued benefit. See sections 411(b)(1)(G) and 411(d)(6).

(ii) Section 401(a)(5)(D) and this paragraph (e) do not apply to a plan maintained by an employer, determined for purposes of the Federal Insurance Contributions Act or the Railroad Retirement Tax Act, as applicable, that does not pay any wages within the meaning of section 3121(a) or compensation within the meaning of section 3231(e). For this purpose, a plan maintained for a self-employed individual within the meaning of section 401(c)(1), who is also subject to the tax under section 1401, is deemed to be a plan maintained by an employer that pays wages within the meaning of section 3121(a).

(iii) If a plan provides for the payment of an employee's accrued retirement benefit (whether or not subsidized) commencing before an employee's social security retirement age, the projected employer-provided primary insurance amount attributable to service by the employee for the employer (as determined under paragraphs (e)(3) and (e)(4) of this section) that may be applied as an offset to limit the employee's accrued retirement benefit must be reduced in accordance with § 1.401(l)–3(e)(1). The reduction is made by multiplying the employee's projected employer-provided primary insurance amount by a fraction, the numerator of which is the appropriate factor under § 1.401(l)–3(e)(1), and the denominator of which is 0.75 percent.

(iv) The Commissioner may, in revenue rulings, notices or other documents of general applicability, prescribe additional rules that may be necessary or appropriate to carry out the purposes of this section, including rules relating to the determination of an employee's projected primary insurance amount attributable to the employee's service for former employers and rules applying section 401(a)(5)(D) with respect to an employer that pays wages within the meaning of section 3121(a) or compensation within the meaning of section 3231(e) for some years and not for other years.

(7) *Effective date.* This paragraph (e) is effective for plan years beginning after December 31, 1988.

(8) *Examples.* The following examples illustrate this paragraph (e).

Example 1. Employer Z maintains a noncontributory defined benefit plan that uses the calendar year as its plan year. The plan provides a normal retirement benefit, commencing at age 65, equal to $500 a year, multiplied by the employee's years of service for Z, limited to the excess of the amount of the employee's final pay from Z (as determined in accordance with paragraph (e)(2) of this section) over the employee's employer-provided primary insurance amount attributable to the employee's service for Z. If an employee's social security retirement age is greater than 65, the plan provides for reduction of the employee's employer-provided primary insurance amount in accordance with paragraph (e)(6)(iii) of this section. The plan provides no limitation on the number of years of service taken into account in determining benefits under the plan. Employee A retires on July 6, 1995, at A's social security retirement age of 65 with 35 years of service for Z. The plan uses the plan year as the 12 month period for determining an employee's year of final highest pay from the employer. A's compensation for A's final 5 plan years is as follows:

1995 plan year	$10,500
1994 plan year	$20,000
1993 plan year	$18,000
1992 plan year	$17,000
1991 plan year	$16,500

A's annual primary insurance amount under social security, determined as of A's social security retirement age, is $9,000, of which $4,500 is the employer-provided portion attributable to A's service for Z ($9,000 × 50 percent × 35/35). Under the plan's benefit formula (disregarding the final pay limitation), A would be entitled to receive a normal retirement benefit of $17,500 ($500 × 35 years). However, under the plan, A's otherwise determined normal retirement benefit of $17,500 is limited to the excess of the amount of A's final pay from Z over A's employer-provided primary insurance amount under social security attributable to A's service for Z. Accordingly, A's normal retirement benefit is determined to be $15,500 ($20,000 (A's final pay from Z) less $4,500 (A's employer-provided primary insurance amount attributable to A's service for Z) rather than $17,500. The final pay limitation in Z's plan satisfies section 401(a)(5)(D) and this paragraph (e). Accordingly, the plan maintained by Z does not discriminate in favor of highly compensated employees within the meaning of section 401(a)(4) merely because of the final pay limitation contained in the plan.

Example 2. Assume the same facts as in *Example 1,* except that A has 32 years of service and service for Z when A retires at A's social security retirement age. Under the plan's benefit formula (disregarding the final pay limitation), A would be entitled to receive an annual normal retirement benefit of $16,000 ($500 × 32 years). However, the plan provides that A's normal retirement benefit of $16,000 will be limited to $15,500 ($20,000 (the amount of A's final pay from Z) less $4,500 (½ of A's primary insurance amount under the Social Security Act)). The final pay limitation does not satisfy this paragraph (e). The portion of A's employer-provided primary insurance amount under the Social Security Act attributable to A's service for Z is 32/35 × $4,500, or $4,114. Therefore, to satisfy this paragraph (e), the final pay provision in Z's plan may not limit A's otherwise determined normal retirement benefit of $16,000 to less than $15,886 ($20,000 (the amount of X's final pay)—$4,114 (the portion of A's employer-provided primary insurance amount attributable to A's service for Z)).

Example 3. (a) Employer X maintains a noncontributory defined benefit plan that uses the calendar year as its plan year. The formula for determining benefits under the plan provides a normal retirement benefit at age 65 equal to 90 percent of an employee's final average compensation, with the benefit reduced by 1/30th for each year of the employee's service less than 30 and limited to the employee's final pay (as determined in accordance with paragraph (e)(2) of this section) less the employee's employer-provided primary insurance amount under social security attributable to the employee's service for X. The plan determines an employee's employer-provided projected primary insurance amount under social security attributable to the employee's service for X in accordance with paragraph (e)(3) of this section and applies the reductions applicable under paragraph (e)(6)(iii) of this section if benefits commence before social security retirement age. The plan determines an employee's accrued benefit under the fractional accrual method of section 411(b)(1)(C).

(b) Employee A commences participation in the plan on January 1, 1990, when A is 35 years of age. A's social security retirement age is 67. As of the close of the 2014 plan year, A's final average compensation from X is $15,000; A's final pay from X is $15,400, and A's projected employer-provided annual primary insurance amount under social security attributable to A's service for X is $4,000 (after the reduction applicable under paragraph (e)(6)(iii) of this section). Under the plan formula, A's accrued benefit as of the close of the 2014 plan year is $11,250 (90 percent × $15,000 × 25/30). As of the close of the 2014 plan year, the plan's final pay limitation does not affect A's benefit because A's accrued benefit under the plan as of the close of the plan year ($11,250) does not exceed A's final pay of $15,400 from X, determined as of the close of the plan year, less A's employer-provided projected primary insurance amount under social security attributable to A's service for X ($4,000).

(c) Assume that, as of the close of the 2015 plan year, A's final average compensation from X is $14,500 and A's final pay from X is $15,400. Assume also that as of the close of the 2015 plan year, A's employer-provided primary insurance amount attributable to A's service for X is $4,200 (after the reduction applicable under paragraph (e)(6)(iii) of this section). Accordingly, A's accrued benefit as of the close of the 2015 plan year is $11,310 (90 percent × $14,500 × 26/30). Under the plan's final pay limitation, A's accrued

benefit of $11,310 would be limited to $11,200, the amount of A's final pay from X ($15,400), less A's employer-provided projected primary insurance amount under social security attributable to A's service for X ($4,200). However, the plan's final pay limitation may not be applied to limit A's accrued benefit for the 2015 plan year to an amount below $11,250, which was A's accrued benefit under the plan at the close of the prior plan year.

The foregoing is further illustrated in the following table for the plan years presented above and for additional years of service performed by A for X.

TABLE

[In dollar amounts]

1 Years of service	2 Final average compensation	3 Benefit under plan formula (Column 2 × 0.9 × years of service/30)	4 Final pay	5 Employer-provided projected primary insurance amount under social security attributable to service for employer	6 Benefit if final pay reduction is applied in full (Column 4 − Column 5)	7 Benefit to which A is entitled (smaller of Column 6 or Column 3, but not less than Column 7 for prior year)
25	$15,000	$11,250	$15,400	$4,000	$11,400	$11,250
26	14,500	11,310	15,400	4,200	11,200	11,250
27	15,500	12,555	15,800	4,400	11,400	11,400
28	15,500	13,020	16,000	4,500	11,500	11,500
29	15,000	13,050	16,000	4,800	11,200	11,500
30	14,500	13,050	16,000	5,000	11,000	11,500

(f) *Certain benefits not taken into account.* In determining whether a plan satisfies section 401(a)(4) and this section, other benefits created under state or federal law (e.g., worker's compensation benefits or black lung benefits) may not be taken into account.

(g) *More than one plan treated as single plan.* [Reserved]

Par. 4. There is added the following new §§ 1.401(l)–0 through 1.401(l)–6 after § 1.401(k)–1 to read as follows:

§ 1.401(l)–0 Table of contents.

This section contains a listing of the headings of §§ 1.401(l)–1 through 1.401(l)–6.

§ 1.401(l)–1 Permitted disparity in employer-provided contributions or benefits.

(a) *Permitted disparity*—(1) *In general.* Section 401(a)(4) provides that a plan is a qualified plan only if the amount of contributions or benefits provided under the plan does not discriminate in favor of highly compensated employees. See § 1.401(a)(4)–1(b)(2). Section 401(a)(5)(C) provides that a plan does not discriminate in favor of highly compensated employees merely because of disparities in employer-provided contributions or benefits provided to, or on behalf of, employees under the plan that are permitted under section 401(l). Thus, if a plan satisfies section 401(l), permitted disparities in employer-provided contributions or benefits under a plan are disregarded, by reason of section 401(a)(5)(C), in determining whether the plan satisfies any of the safe harbors under §§ 1.401(a)(4)–2(b)(3) and 1.401(a)(4)–3(b). However, even if disparities in employer-provided contributions or benefits under a plan are permitted under section 401(l) and thus do not cause the plan to fail to satisfy § 1.401(a)(4)–1(b)(2), the plan may still fail to satisfy section 401(a)(4) for other reasons. Similarly, even if disparities in employer-provided contributions or benefits under a plan are not permitted under section 401(l) and thus may not be disregarded under section 401(a)(4) by reason of section 401(l), the plan may still be found to be nondiscriminatory under the tests of section 401(a)(4), including the rules for imputing permitted disparity under § 1.401(a)(4)–7.

(2) *Overview.* Rules relating to disparities in employer-provided contributions under a defined contribution plan are provided in § 1.401(l)–2. For rules relating to disparities in employer-provided benefits under a defined benefit plan, see § 401(l)–3. For rules relating to the application of section 401(l) to a plan maintained by a railroad employer, see § 1.401(l)–4. For rules relating to the overall permitted disparity limits, see § 1.401(l)–5. For rules relating to the effective date of section 401(l), see § 1.401(l)–6.

(3) *Exclusive rules.* The rules provided in § § 1.401(l)–1 through 1.401(l)–6 are the exclusive means for a plan to satisfy sections 401(l) and 401(a)(5)(C). Accordingly, a plan that provides disparities in employer-provided contributions or benefits that are not permitted under § § 1.401(l)–1 through 1.401(l)–6 does not satisfy section 401(l) or 401(a)(5)(C). For example, a defined

benefit plan that reduces an employee's employer-provided benefit by an offset based on the employee's benefits under the Social Security Act does not satisfy section 401(l) and may not rely on section 401(l) to satisfy section 401(a)(4).

(4) *Exceptions.* Sections 401(a)(5(C) and 401(l) are not available in the following arrangements—

(i) A plan maintained by an employer, determined for purposes of the Federal Insurance Contributions Act or the Railroad Retirement Tax Act, as applicable, that does not pay any wages within the meaning of section 3121(a) or compensation within the meaning of section 3231(e). For this purpose, a plan maintained for a self-employed individual within the meaning of section 401(c)(1), who is also subject to the tax under section 1401, is deemed to be a plan maintained by an employer that pays wages within the meaning of section 3121(a).

(ii) A plan, or the portion of a plan, that is an employee stock ownership plan described in section 4975(e)(7) (an ESOP) or a tax credit employee stock ownership plan described in section 409(a) (a TRASOP), except as provided in § 54.4975–11(a)(7)(ii) of this chapter, which contains a limited exception to this rule for certain ESOPs in existence on November 1, 1977.

(iii) With respect to elective contributions as defined in § 1.401(k)–1(g)(3) under a qualified cash or deferred arrangement as defined in § 1.401(k)–1(a)(4)(i) or with respect to employee or matching contributions defined in § 1.401(m)–1(f)(6) or (f)(12), respectively.

(iv) With respect to contributions to a simplified employee pension made under a salary reduction arrangement described in section 408(k)(6) (a SARSEP).

(5) *Additional rules.* The Commissioner may, in revenue rulings, notices, or other documents of general applicability, prescribe additional rules that may be necessary or appropriate to carry out the purposes of section 401(l), including rules applying section 401(l) with respect to an employer that pays wages within the meaning of section 3121(a) or compensation within the meaning of section 3231(e) for some years and not other years.

(b) *Relationship to other requirements*—(1) *In general.* Unless explicitly provided otherwise, section 401(l) does not provide an exception to any other requirement under section 401(a). Thus, for example, even if the plan complies with section 401(l), the plan may not adjust benefits in any manner that results either in a decrease in any employee's accrued benefit in violation of section 411(d)(6) and section 411(b)(1)(G) or in a benefit lower than the minimum benefit required under section 416. Similarly, see section 401(a)(15) for additional rules relating to circumstances under which plan benefits may not be decreased because of increases in social security benefits. A plan does not fail to satisfy section 401(l) merely because, in order to comply with section 411, an employee's accrued benefit under the plan is not reduced, even though a strict application of the plan's benefit formula and accrual method would otherwise result in a reduced benefit.

(2) *Determination of accrued benefit to avoid reduction.* If a strict application of the plan's benefit formula and accrual method would otherwise result in a benefit lower than the employee's accrued benefit (for example, as a result of an increase in covered compensation), the employee's accrued benefit for later years must be determined under the formula contained in § 1.401(a)(4)–13(c)(3) (formula with wear-away). In applying that formula, the plan must use the last day of the plan year immediately before the potential reduction in accrued benefit as the fresh-start date and the plan's benefit formula as the formula applicable to benefit accruals in the current plan year.

(c) *Definitions.* In applying §§ 1.401(l)–1 through 1.401(l)–6, the definitions in this paragraph (c) govern unless otherwise provided.

(1) *Accumulation plan. Accumulation plan* means an accumulation plan within the meaning of § 1.401(a)(4)–12.

(2) *Average annual compensation. Average annual compensation* means average annual compensation within the meaning of § 1.401(a)(4)–3(e)(2), taking into account the special optional rules under § 1.401(a)(4)–3(b)(8)(x).

(3) *Base benefit percentage. Base benefit percentage* means the rate at which employer-provided benefits are determined under a defined benefit excess plan with respect to an employee's average annual compensation at or below the integration level (expressed as a percentage of such average annual compensation).

(4) *Base contribution percentage. Base contribution percentage* means the rate at which employer contributions are allocated to the account of an employee under a defined contribution excess plan with respect to the employee's plan year compensation at or below the integration level (expressed as a percentage of such plan year compensation).

(5) *Benefit formula. Benefit formula* means benefit formula within the meaning of § 1.401(a)(4)–12.

(6) *Benefits, rights, and features. Benefits, rights, and features* means benefits, rights, and features within the meaning of § 1.401(a)(4)–12.

(7) *Covered compensation*—(i) *In general. Covered compensation* for an employee means the average (without indexing) of the taxable wage bases in effect for each calendar year during the 35-year period ending with the last day of the calendar year in which the employee attains (or will attain) social security retirement age. A 35-year period is used for all individuals regardless of the year of birth of the individual. In determining an employee's covered compensation for a plan year, the taxable wage base for all calendar years beginning after the first day of the plan year is assumed to be the same as the taxable wage base in effect as of the beginning of the plan year. An employee's covered compensation for a plan year beginning after the 35-year period applicable under this paragraph (c)(7)(i) is the employee's covered compensation for the plan year during which the 35-year period ends. An employee's covered compensation for a plan year beginning before the 35-year period applicable under this paragraph (c)(7)(i) is the taxable wage base in effect as of the beginning of the plan year.

(ii) *Special rules*—(A) *Rounded table.* For purposes of determining the amount of an employee's covered compensation under paragraph (c)(7)(i) of this section, a plan may use tables, provided by the Commissioner, that are developed by rounding the actual amounts of covered compensation for different years of birth.

(B) *Proposed regulation definition.* For plan years beginning before January 1, 1995, in lieu of the definition of covered compensation contained in paragraph (c)(7)(i) of this section, a plan may define covered compensation as the average (without indexing) of the taxable wage bases in effect for each calendar year during the 35-year period ending with the last day of the calendar year preceding the calendar year in which the employee attains (or will attain) social security retirement age.

(iii) *Period for using covered compensation amount.* A plan must generally provide that an employee's covered compensation is automatically adjusted for each plan year. However, a plan may use an amount of covered compensation for employees equal to each employee's covered compensation (as defined in paragraph (c)(7)(i) or

(c)(7)(ii) of this section) for a plan year earlier than the current plan year, provided the earlier plan year is the same for all employees and is not earlier than the later of—

(A) The plan year that begins 5 years before the current plan year, and

(B) The plan year beginning in 1989. In the case of an accumulation plan, the benefit accrued for an employee in prior years is not affected by changes in the employee's covered compensation that occur in later years.

(8) *Defined benefit plan. Defined benefit plan* means a defined benefit plan within the meaning of § 1.410(b)–9.

(9) *Defined contribution plan. Defined contribution plan* means a defined contribution plan within the meaning of § 1.410(b)–9.

(10) *Disparity. Disparity* means—

(i) In the case of a defined contribution excess plan, the amount by which the excess contribution percentage exceeds the base contribution percentage,

(ii) In the case of a defined benefit excess plan, the amount by which the excess benefit percentage exceeds the base benefit percentage, and

(iii) In the case of an offset plan, the offset percentage.

(11) *Employee. Employee* means employee within the meaning of § 1.401(a)(4)–12.

(12) *Employer. Employer* means the employer within the meaning of § 1.410(b)–9.

(13) *Employer contributions. Employer contributions* means all amounts taken into account with respect to an employee under a plan under § 1.401(a)(4)–2(c)(2)(ii).

(14) *Excess benefit percentage. Excess benefit percentage* means the rate at which employer-provided benefits are determined under a defined benefit excess plan with respect to an employee's average annual compensation above the integration level (expressed as a percentage of such average annual compensation).

(15) *Excess contribution percentage. Excess contribution percentage* means the rate at which employer contributions are allocated to the account of an employee under a defined contribution excess plan with respect to the employee's plan year compensation above the integration level (expressed as a percentage of such plan year compensation).

(16) *Excess plan*—(i) *Defined benefit excess plan. Defined benefit excess plan* means a defined benefit plan under which the rate at which employer-provided benefits are determined with respect to average annual compensation above the integration level under the plan (expressed as a percentage of such average annual compensation) is greater than the rate at which employer-provided benefits are determined with respect to average annual compensation at or below the integration level (expressed as a percentage of such average annual compensation).

(ii) *Defined contribution excess plan. Defined contribution excess plan* means a defined contribution plan under which the rate at which employer contributions are allocated to the account of an employee with respect to plan year compensation above the integration level (expressed as a percentage of such plan year compensation) is greater than the rate at which employer contributions are allocated to the account of an employee with respect to plan year compensation at or below the integration level (expressed as a percentage of such plan year compensation).

(17) *Final average compensation*—(i) *In general. Final average compensation* for an employee means the average of the employee's annual section 414(s) compensation from the employer for the 3-consecutive-year period ending with or without the plan year. The year in which an employee terminates employment may be disregarded in determining final average compensation. If, as of a plan year, an employee's entire period of employment with the employer is less than 3 consecutive years, the employee's final average compensation must be determined by averaging the annual section 414(s) compensation received by the employee from the employer during the employee's entire period of employment with the employer. The definition of final average compensation used in the plan must be applied consistently with respect to all employees. For example, if the plan provides that the year in which the employee terminates employment is disregarded in determining final average compensation, the year must be disregarded for all employees who terminate employment in that year. The plan may specify any 3-consecutive-year period ending in the plan year, provided the period is determined consistently for all employees.

(ii) *Limitations.* In determining an employee's final average compensation under this paragraph (c)(16), annual section 414(s) compensation for any year in excess of the taxable wage base in effect at the beginning of that year must not be taken into account. A plan may provide that each employee's final average compensation for a plan year is limited to the employee's average annual compensation for the plan year.

(iii) *Determination of section 414(s) compensation.* A plan must use the same definition of section 414(s) compensation to determine final average compensation as the plan uses to determine average annual compensation (or plan year compensation in the case of an accumulation plan).

(18) *Gross benefit percentage. Gross benefit percentage* means the rate at which employer-provided benefits are determined under an offset plan (before application of the offset) with respect to an employee's average annual compensation (expressed as a percentage of average annual compensation).

(19) *Highly compensated employee. Highly compensated employee* means a highly compensated employee within the meaning of § 1.401(a)(4)–12.

(20) *Integration level. Integration level* means the dollar amount specified in an excess plan at or below which the rate of employer-provided contributions or benefits (expressed in each case as a percentage of an employee's plan year compensation or average annual compensation up to the specified dollar amount) under the plan is less than the rate of employer-provided contributions or benefits (expressed in each case as a percentage of the employee's plan year compensation or average annual compensation above the specified dollar amount) under the plan above such dollar amount.

(21) *Nonexcludable employee. Nonexcludable employee* means an employee within the meaning of § 1.410(b)–9, other than an excludable employee with respect to the plan as determined under § 1.410(b)–6. A nonexcludable employee may be either a highly or nonhighly compensated nonexcludable employee, depending on the nonexcludable employee's status under section 414(q).

(22) *Offset level. Offset level* means the dollar limit specified in the plan on the amount of each employee's final average compensation taken into account in determining the offset under an offset plan.

(23) *Offset percentage. Offset percentage* means the rate at which an employee's employer-provided benefit is reduced or offset under an offset plan (expressed as a percentage of the employee's final average compensation up to the offset level).

(24) *Offset plan. Offset plan* means a defined benefit plan that is not a defined benefit excess plan and that provides that each employee's employer-provided benefit is reduced or offset by a specified percentage of the employee's

final average compensation up to the offset level under the plan.

(25) *Plan. Plan* means a plan within the meaning of § 1.401(a)(4)–12 or a component plan treated as a plan under § 1.401(a)(4)–9(c).

(26) *Plan year compensation. Plan year compensation* means plan year compensation within the meaning of § 1.401(a)(4)–12.

(27) *Qualified plan. Qualified plan* means a qualified plan within the meaning of § 1.401(a)(4)–12.

(28) *Section 401(l) plan. Section 401(l) plan* means a section 401(l) plan within the meaning of § 1.401(a)(4)–12.

(29) *Section 414(s) compensation. Section 414(s) compensation* means section 414(s) compensation within the meaning of § 1.401(a)(4)–12.

(30) *Social security retirement age. Social security retirement age* for an employee means the social security retirement age of the employee as determined under section 415(b)(8).

(31) *Straight life annuity. Straight life annuity* means a straight life annuity within the meaning of § 1.401(a)(4)–12.

(32) *Taxable wage base. Taxable wage base* means the contribution and benefit base under section 230 of the Social Security Act (42 U.S.C. 430).

(33) *Year of service. Year of service* means a year of service as defined in the plan for purposes of the benefit formula and the accrual method under the plan, unless the context clearly indicates otherwise. An employee may be credited with no more than 1 year of service with respect to any 12-consecutive-month period, except for those cases in which additional service is required to be credited under section 410 or 411, whichever is applicable.

§ 1.401(l)–2 Permitted disparity for defined contribution plans.

(a) *Requirements*—(1) *In general.* Disparity in the rates of employer contributions allocated to employees' accounts under a defined contribution plan is permitted under section 401(l) and this section for a plan year only if the plan satisfies paragraphs (a)(2) through (a)(5) of this section. A plan that otherwise satisfies this paragraph (a) will not be considered to fail section 401(l) merely because it contains one or more provisions described in § 1.401(a)(4)–2(b)(5). See § 1.401(a)(4)–8(b)(3)(i)(E) for special rules applicable to target benefit plans.

(2) *Excess plan requirement.* The plan must be a defined contribution excess plan.

(3) *Maximum disparity.* The disparity for all employees under the plan must not exceed the maximum permitted disparity prescribed in paragraph (b) of this section.

(4) *Uniform disparity.* The disparity for all employees under the plan must be uniform within the meaning of paragraph (c) of this section.

(5) *Integration level.* The integration level specified in the plan must satisfy paragraph (d) of this section.

(b) *Maximum permitted disparity*—(1) *In general.* The disparity provided for the plan year must not exceed the maximum excess allowance as defined in paragraph (b)(2) of this section. In addition, the plan must satisfy the overall permitted disparity limits of § 1.401(l)–5.

(2) *Maximum excess allowance.* The maximum excess allowance for a plan year is the lesser of—

(i) The base contribution percentage, or

(ii) The greater of—

(A) 5.7 percent, reduced as required under paragraph (d) of this section, or

(B) The percentage rate of tax under section 3111(a), in effect as of the beginning of the plan year, that is attributable to the old age insurance portion of the Old Age, Survivors and Disability Insurance provisions of the Social Security Act, reduced as required under paragraph (d) of this section. For a year in which the percentage rate of tax described in this paragraph (b)(2)(ii)(B) exceeds 5.7 percent, the Commissioner will publish the rate of such tax and a revised table under paragraph (d)(4) of this section.

(c) *Uniform disparity*—(1) *In general.* The disparity provided under a plan is uniform only if the plan uses the same base contribution percentage and the same excess contribution percentage for all employees in the plan.

(2) *Deemed uniformity*—(i) *In general.* The disparity under a plan does not fail to be uniform for purposes of this paragraph (c) merely because the plan contains one or more of the provisions described in paragraphs (c)(2) (ii) and (iii) of this section.

(ii) *Overall permitted disparity.* The plan provides that, in the case of each employee who has reached the cumulative permitted disparity limit applicable to the employee under § 1.401(l)–5(c), employer contributions are allocated to the account of the employee with respect to the employee's total plan year compensation at the excess contribution percentage.

(iii) *Non-FICA employees.* The plan provides that, in the case of each employee under the plan with respect to whom none of the taxes under section 3111(a), section 3221, or section 1401 is required to be paid, employer contributions are allocated to the account of the employee with respect to the employee's total plan year compensation at the excess contribution percentage.

(d) *Integration level*—(1) *In general.* The integration level under the plan must satisfy paragraph (d)(2), (d)(3), or (d)(4) of this section, as modified by paragraph (d)(5) of this section in the case of a short plan year. If a reduction applies to the disparity factor under this paragraph (d), the reduced factor is used for all purposes in determining whether the permitted disparity rules for defined contribution plans are satisfied.

(2) *Taxable wage base.* The requirement of this paragraph (d)(2) is satisfied only if the integration level under the plan for each employee is the taxable wage base in effect as of the beginning of the plan year.

(3) *Single dollar amount.* The requirement of this paragraph (d)(3) is satisfied only if the integration level under the plan for all employees is a single dollar amount (either specified in the plan or determined under a formula specified in the plan) that does not exceed the greater of $10,000 or 20 percent of the taxable wage base in effect as of the beginning of the plan year.

(4) *Intermediate amount.* The requirement of this paragraph (d)(4) is satisfied only if—

(i) the integration level under the plan for all employees is a single dollar amount (either specified in the plan or determined under a formula specified in the plan) that is greater than the highest amount determined under paragraph (d)(3) of this section and less than the taxable wage base, and

(ii) The plan adjusts the factor determined under paragraph (b)(2)(ii) of this section in accordance with the table below.

TABLE

If the integration level		The 5.7 percent factor in the maximum excess allowance is reduced to—
Is more than	But not more than	
Greater of $10,000 or 20% of taxable wage base.	80% of taxable wage base.	4.3%
80% of taxable wage base.	Amount less than taxable wage base.	5.4%

(5) *Prorated integration level for short plan year.* If a plan uses paragraph (4) of the definition of plan year compensation

under § 1.401(a)(4)–12 (i.e., section 414(s) compensation for the period of plan participation) and has a plan year that comprises fewer than 12 months, the integration level under the plan for each employee must be an amount equal to the otherwise applicable integration level described in paragraph (d)(2), (d)(3), or (d)(4) of this section, multiplied by a fraction, the numerator of which is the number of months in the plan year, and the denominator of which is 12. No adjustment to the maximum excess allowance is required as a result of the application of this paragraph (d)(5), other than any adjustment already required under paragraph (d)(4) of this section.

(e) *Examples.* The following examples illustrate this section. In each example, 5.7 percent exceeds the percentage rate of tax described in paragraph (b)(2)(ii) of this section.

Example 1. Employer X maintains a profit-sharing plan with the calendar year as its plan year. For the 1989 plan year, the plan provides that the account of each employee who has plan year compensation in excess of the taxable wage base in effect at the beginning of the plan year will receive an allocation for the plan year of 5.7 percent of plan year compensation in excess of the taxable wage base. The plan provides that no allocation will be made to the account of any employee for the plan year with respect to plan year compensation not in excess of the taxable wage base. The maximum excess allowance is exceeded for the 1989 plan year because the excess contribution percentage (5.7 percent) for the plan year exceeds the base contribution percentage (0 percent) for the plan year by more than the lesser of the base contribution percentage (0 percent) or the percentage determined under paragraph (b)(2)(ii) of this section (5.7 percent) for the plan year.

Example 2. Employer Y maintains a money purchase pension plan with the calendar year as its plan year. For the 1990 plan year, the plan provides that the account of each employee will receive an allocation of 5 percent of the employee's plan year compensation up to the taxable wage base in effect at the beginning of the plan year plus an allocation of 10 percent of the employee's plan year compensation in excess of the taxable wage base. The maximum excess allowance is not exceeded for the plan year because the excess contribution percentage (10 percent) for the plan year does not exceed the base contribution percentage (5 percent) for the plan year by more than the lesser of the base contribution percentage (5 percent) or the percentage determined under paragraph (b)(2)(ii) of this section (5.7 percent) for the plan year.

Example 3. Assume the same facts as in *Example 2,* except that the plan provides that, with respect to plan year compensation in excess of the taxable wage base, the account of each employee will receive an allocation for the plan year of 12 percent of such compensation. The maximum excess allowance is exceeded for the plan year because the excess contribution percentage (12 percent) for the plan year exceeds the base contribution percentage (5 percent) for the plan year by more than the lesser of the base contribution percentage (5 percent) or the percentage determined under paragraph (b)(2)(ii) of this section (5.7 percent) for the plan year.

Example 4. Employer Z maintains a money purchase pension plan with a plan year beginning July 1 and ending June 30. The taxable wage base for the 1990 calendar year is $51,300 and the taxable wage base for the 1991 calendar year is $53,400. For the plan year beginning July 1, 1990, and ending June 30, 1991, the plan provides that the account of each employee will receive an allocation of 4 percent of the employee's plan year compensation up to $53,400 plus an allocation of 6 percent of the employee's plan year compensation in excess of $53,400. Although the excess contribution percentage (6 percent) for the plan year does not exceed the base contribution percentage (4 percent) for the plan year by more than the lesser of the base contribution percentage (4 percent) or the percentage determined under paragraph (b)(2)(ii) of this section (5.7 percent), the plan does not satisfy paragraph (a)(5) of this section because the integration level of $53,400 exceeds the maximum permitted integration level of $51,300 (the taxable wage base in effect as of the beginning of the plan year).

Example 5. Assume the same facts as in *Example 4,* except that for the plan year beginning July 1, 1990, and ending June 30, 1991, the plan provides that the account of each employee will receive an allocation of 5 percent of the employees plan year compensation up to $30,000 plus an allocation of 9 percent of the employee's plan year compensation in excess of $30,000. The integration level of $30,000 is 58 percent of the taxable wage base of $51,300 for the 1990 calendar year. The maximum excess allowance is not exceeded for the plan year because the excess contribution percentage (9 percent) for the plan year does not exceed the base contribution percentage (5 percent) for the plan year by more than the lesser of the base contribution percentage (5 percent) or the percentage determined under paragraphs (b)(2)(ii) and (d) of this section (4.3 percent) for the plan year.

§ 1.401(l)–3 Permitted disparity for defined benefit plans.

(a) *Requirements*—(1) *In general.* Disparity in the rates of employer-provided benefits under a defined benefit plan is permitted under section 401(l) and this section for a plan year only if the plan satisfies paragraphs (a)(2) through (a)(6) of this section. A plan that otherwise satisfies this paragraph (a) will not be considered to fail section 401(l) merely because it contains one or more provisions described in § 1.401(a)(4)–3(b)(8) (such as multiple formulas). Section 401(a)(5)(D) and § 1.401(a)(5)–1(d) provide other rules under which benefits provided under a defined benefit plan (including defined benefit excess and offset plans) may be limited. See § 1.401(a)(4)–3(b)(7)(viii) for special rules under which an insurance contract plan may satisfy § 1.401(a)(4)–1(b)(2) and section 401(l). See § 1.401(a)(4)–8(c)(3)(iii)(B) for special rules applicable to cash balance plans.

(2) *Excess or offset plan requirement.* The plan must be a defined benefit excess plan or an offset plan.

(3) *Maximum disparity.* The disparity for all employees under the plan must not exceed the maximum permitted disparity prescribed in paragraph (b) of this section.

(4) *Uniform disparity.* The disparity for all employees under the plan must be uniform within the meaning of paragraph (c) of this section.

(5) *Integration or offset level.* The integration or offset level specified in the plan must satisfy paragraph (d) of this section.

(6) *Benefits, rights, and features.* The benefits, rights, and features provided under the plan must satisfy paragraph (f) of this section.

(b) *Maximum permitted disparity*—(1) *In general.* In the case of a defined benefit excess plan, the disparity provided for the plan year may not exceed the maximum excess allowance as defined in paragraph (b)(2) of this section. In the case of an offset plan, the disparity provided for the plan year may not exceed the maximum offset allowance as defined in paragraph (b)(3) of this section. In addition, either type of plan must satisfy the overall permitted disparity limits of § 1.401(l)–5.

(2) *Maximum excess allowance.* The maximum excess allowance for a plan year is the lesser of—

(i) 0.75 percent, reduced as required under paragraphs (d) and (e) of this section, or

(ii) The base benefit percentage for the plan year.

(3) *Maximum offset allowance.* The maximum offset allowance for a plan year is the lesser of—

(i) 0.75 percent, reduced as required under paragraphs (d) and (e) of this section, or

(ii) One-half of the gross benefit percentage, multiplied by a fraction (not to exceed one), the numerator of which is the employee's average annual compensation, and the denominator of which is the employee's final average compensation up to the offset level.

(4) *Rules of application*—(i) *Disparity provided for the plan year.* Disparity provided for the plan year generally means the disparity provided under the plan's benefit formula for the employee's year of service with respect to the plan

year. However, if a plan determines each employee's accrued benefit under the fractional accrual method of section 411(b)(1)(C) disparity provided under the plan also means the disparity in the benefit accrued for the employee for the plan year. Thus, a plan using the fractional accrual method must satisfy this paragraph (b) with respect to the plan's benefit formula and with respect to the benefits accrued for the plan year.

(ii) *Reduction in disparity rate.* Any reductions in the 0.75–percent factor required under paragraphs (d) and (e) of this section are cumulative.

(iii) *Normal and optional forms of benefit*—(A) *In general.* A plan satisfies the maximum permitted disparity requirement of this paragraph (b) only if the plan satisfies this paragraph (b) with respect to each optional form of benefit (including the normal form of benefit) provided under the plan.

(B) *Level annuity forms.* In the case of an optional form of benefit payable as a level annuity over a period of not less than the life of the employee, the optional form must satisfy the maximum permitted disparity requirement of this paragraph (b). Thus, for example, if the form of a defined benefit plan's normal retirement benefit is an annuity for life with a 10-year certain feature and the plan permits employees to elect an optional form of benefit in the form of a straight life annuity, the plan must satisfy the maximum disparity requirement of this paragraph (b) with respect to each of the optional forms of benefit. An annuity that decreases only after the death of the employee, or that decreases only after the death of either the employee or the joint annuitant, is considered a level annuity for purposes of this paragraph (b).

(C) *Other forms.* In the case of an optional form of benefit that is not described in paragraph (b)(4)(iii)(B) of this section, the optional form must satisfy the maximum permitted disparity requirement of this paragraph (b), when the respective portions of the optional form are normalized under the rules of § 1.401(a)(4)–3(d)(5)(iv) to a straight life annuity commencing at the same time as the optional form of benefit, regardless of whether the straight life annuity form is actually provided under the plan. In the case of a defined benefit excess plan, the respective portions are the portion of the optional form attributable to average annual compensation up to the integration level (the "base portion") and the portion of the optional form attributable to average annual compensation in excess of the integration level (the "excess portion"). In the case of an offset plan, the respective portions are the optional form determined without regard to the offset (the "gross amount") and the offset applied to the gross amount to determine the optional form (the "offset amount").

(D) *Post-retirement cost-of-living adjustments—(1) In general.* A benefit does not fail to be a level annuity described in paragraph (b)(4)(iii)(B) of this section merely because it provides an automatic post-retirement cost-of-living adjustment that satisfies paragraph (b)(4)(iii)(D)(*2*) of this section. Thus, increases in the employee's annuity pursuant to such a cost-of-living adjustment do not cause the disparity provided under the optional form of benefit to exceed the maximum disparity permitted under this paragraph (b). For rules on ad hoc post-retirement cost-of-living adjustments, see § 1.401(a)(4)–10(b).

(*2*) *Requirements.* A cost-of-living adjustment satisfies this paragaph (b)(4)(iii)(D)(*2*) if—

(*i*) It is included in the accrued benefit of all employees, and.

(*ii*) It increases, on a uniform and consistent basis, the benefits of all former employees who are no younger than age 62, at a rate no greater than adjustments to social security benefits under section 215(i)(2)(A) of the Social Security Act that have occurred since the later of the employee's attainment of age 62 or commencement of benefits.

(E) *Section 417(e) exception.* A plan will not fail to satisfy this paragraph (b) merely because the disparity in a benefit that is subject to the interest rate restrictions of sections 401(a)(11) and 417(e) exceeds the maximum disparity that would otherwise be allowed under this paragraph (b) to the extent the increase in disparity is required to satisfy § 1.417(e)–1(d).

(5) *Examples.* The following examples illustrate this paragraph (b). Unless otherwise provided, the following facts apply. The plan is noncontributory and is the only plan ever maintained by the employer. The plan uses a normal retirement age of 65 and contains no provision that would require a reduction in the 0.75-percent factor under paragraph (b)(2) or (b)(3) of this section. In the case of a defined benefit excess plan, the plan uses each employee's covered compensation as the integration level; in the case of an offset plan, the plan uses each employee's covered compensation as the offset level and provides that an employee's final average compensation is limited to the employee's average annual compensation. Each example discusses the benefit formula applicable to an employee who has a social security retirement age of 65.

Example 1. Plan N is a defined benefit excess plan that provides a normal retirement benefit of 0.5 percent of average annual compensation in excess of the integration level, for each year of service. The plan provides no benefits with respect to average annual compensation up to the integration level. The disparity provided under the plan exceeds the maximum excess allowance because the excess benefit percentage (0.5 percent) exceeds the base benefit percentage (0 percent) by more than the base benefit percentage (0 percent).

Example 2. Plan O is an offset plan that provides a normal retirement benefit equal to 2 percent of average annual compensation, minus 0.75 percent of final average compensation up to the offset level, for each year of service up to 35. The disparity provided under the plan satisfies this paragraph (b) because the offset percentage (0.75 percent) does not exceed the maximum offset allowance equal to the lesser of 0.75 percent or one-half of the gross benefit percentage (1 percent).

Example 3. Plan P is a defined benefit excess plan that provides a normal retirement benefit of 0.5 percent of average annual compensation up to the integration level, plus 1.25 percent of average annual compensation in excess of the integration level, for each year of service up to 35. The disparity provided under the plan exceeds the maximum excess allowance because the excess benefit percentage (1.25 percent) exceeds the base benefit percentage (0.5 percent) by more than the base benefit percentage (0.5 percent).

Example 4. Plan Q is an offset plan that provides a normal retirement benefit of 1 percent of average annual compensation, minus 0.75 percent of final average compensation up to the offset level, for each year of service up to 35. The disparity under the plan exceeds the maximum offset allowance because the offset percentage exceeds one-half of the gross benefit percentage (0.5 percent).

Example 5. (a) Plan R is an offset plan that provides a normal retirement benefit of 1 percent of average annual compensation, minus 0.5 percent of final average compensation up to the offset level, for each year of service up to 35. The plan determines an employee's average annual compensation using an averaging period comprising five consecutive 12-month periods and taking into account the employee's compensation for the ten consecutive 12-month periods ending with the plan year. The plan does not provide that an employee's final average compensation is limited to the employee's average annual compensation.

(b) Employee A has average annual compensation of $20,000, final average compensation of $25,000, and covered compensation of $32,000. The maximum offset allowance applicable to Employee A for the plan year under paragraph (b)(3) of this section is one-half of the gross benefit percentage multiplied by the ratio, not to exceed one, of Employee A's average annual compensation to Employee A's final average compensation up to the offset level. Thus, the maximum offset allowance is 0.4 percent (½

× 1 percent×$20,000/$25,000). With respect to Employee A, the benefit formula provides an offset that exceeds the maximum offset allowance. The plan must therefore reduce Employee A's offset percentage to 0.4 percent. (Under paragraph (c)(2)(viii) of this section, Employee A's adjusted disparity rate is deemed uniform.)

(c) Alternatively, under § 1.401(l)-1(c)(17)(ii) (the definition of final average compensation), the plan could specify that an employee's final average compensation is limited to the amount of the employee's average annual compensation. Thus, the ratio of average annual compensation to final average compensation would always be equal to at least one, and the maximum offset allowance under the plan would be one-half of the gross benefit percentage.

Example 6. Plan S is a defined benefit excess plan that provides a base benefit percentage of 1 percent of average annual compensation up to the integration level for each year of service. The plan also provides, for each of the first 10 years of service, an excess benefit percentage of 1.85 percent of average annual compensation in excess of the integration level. For each year of service after 10, the plan provides an excess benefit percentage of 1.65 percent of the employee's average annual compensation in excess of the integration level. The disparity provided under the plan exceeds the maximum excess allowance because the excess benefit percentage for each of the first ten years of service (1.85 percent) exceeds the base benefit percentage (1 percent) by more than 0.75 percent.

Example 7. The facts are the same as in *Example 6*, except that the plan provides an excess benefit percentage of 1.65 percent of average annual compensation in excess of the integration level for each of the first 10 years of service and an excess benefit percentage of 1.85 percent of average annual compensation in excess of the integration level for each year of service after 10. The disparity provided under the plan exceeds the maximum excess allowance because the excess benefit percentage for each year of service after 10 (1.85 percent) exceeds the base benefit percentage (1 percent) by more than 0.75 percent.

Example 8. Plan T is a defined benefit excess plan that provides a normal retirement benefit of 1.0 percent of average annual compensation up to the integration level, plus 1.7 percent of average annual compensation in excess of the integration level, for each year of service up to 35, payable in the form of a joint and survivor annuity. The plan also allows an employee to receive the retirement benefit in the form of an actuarially equivalent straight life annuity. The actuarially equivalent straight life annuity equals 1.09 percent of average annual compensation up to the integration level, plus 1.85 percent of average annual compensation in excess of the integration level, for each year of service up to 35. The disparity provided under the plan with respect to the straight life annuity form of benefit (0.76 percent) exceeds the maximum excess allowance because the excess benefit percentage (1.85 percent) exceeds the base benefit percentage (1.09 percent) by more than 0.75 percent.

Example 9. Plan U is a defined benefit excess plan that provides a normal retirement benefit of 1.0 percent of average annual compensation up to the integration level, plus 1.7 percent of average annual compensation in excess of the integration level, for each year of service up to 35, payable in the form of a straight life annuity. Plan U provides a single sum optional form of benefit at normal retirement age equal to 100 times the monthly annuity payable at that age. Thus, if an employee elects the single sum optional form of benefit, the base portion of the single sum benefit is 100 percent (100 times 1.0 percent) of average annual compensation up to the integration level per year of service, and the excess portion of the single sum benefit is 170 percent (100 times 1.7 percent) of average annual compensation in excess of the integration level per year of service. Each respective portion of the single sum option is normalized to a straight life annuity commencing at normal retirement age, using 8-percent interest and the UP-84 mortality table. After normalization, the base portion of the benefit is 1.02 percent of average annual compensation up to the integration level, and the excess portion of the benefit is 1.73 percent of average annual compensation in excess of the integration level. The single sum optional form of benefit satisfies this paragraph (b) because the disparity provided in the optional form of benefit does not exceed the maximum excess allowance.

(c) *Uniform disparity*—(1) *In general.* The disparity provided under a defined benefit excess plan is uniform only if the plan uses the same base benefit percentage and the same excess benefit percentage for all employees with the same number of years of service. The disparity provided under an offset plan is uniform if and only if the plan uses the same gross benefit percentage and the same offset percentage for all employees with the same number of years of service. The disparity provided under a plan that determines each employee's accrued benefit under the fractional accrual method of section 411(b)(1)(C) is uniform only if the plan satisfies one of the deemed uniformity rules of paragraph (c)(2) (ii) or (iii) of this section.

(2) *Deemed uniformity*—(i) *In general.* The disparity provided under a plan does not fail to be uniform for purposes of this paragraph (c) merely because the plan contains one or more of the provisions described in paragraphs (c)(2) (ii) through (viii) of this section.

(ii) *Use of fractional accrual and disparity for 35 years.* The plan formula provides a benefit as described in paragraphs (c)(2)(ii) (A) and (B) of this section, and the plan determines each employee's accrued benefit under the method described in § 1.401(a)(4)-3(b)(4)(i)(B) or 1.401(a)(4)-3(b)(5)(i)(B), i.e., by multiplying the employee's fractional rule benefit (within the meaning of § 1.411(b)-1(b)(3)(ii)(A)) by a fraction, the numerator of which is the employee's years of service determined as of the plan year, and the denominator of which is the employee's projected years of service as of normal retirement age.

(A) For each year of service at least up to 35, the plan formula provides the same base benefit percentage and the same excess benefit percentage for all employees in the case of a defined benefit excess plan or the same gross benefit percentage and the same offset percentage for all employees in the case of an offset plan.

(B) For each additional year of service, the plan provides a benefit at a uniform percentage of all average annual compensation that is no greater than the excess benefit percentage or the gross benefit percentage under paragraph (c)(2)(ii)(A) of this section, whichever is applicable.

(iii) *Use of fractional accrual and disparity for fewer than 35 years.* The plan formula provides a benefit as described in paragraphs (c)(2)(iii) (A) through (C) of this section, and the plan determines each employee's accrued benefit under the method described in § 1.401(a)(4)-3(b)(4)(i)(B) or 1.401(a)(4)-3(b)(5)(i)(B).

(A) For each year in the employee's initial period of service comprising fewer than 35 years, the plan formula provides the same base benefit percentage and the same excess benefit percentage for all employees in the case of a defined benefit excess plan or the same gross benefit percentage and the same offset percentage for all employees in the case of an offset plan.

(B) For each year of service after the initial period and at least up to 35, the plan formula provides a benefit at a uniform percentage of all average annual compensation, that is equal to the excess benefit percentage or the gross benefit percentage under paragraph (c)(2)(iii)(A) of this section.

(C) For each year of service after the period described in paragraph (c)(2)(iii)(B) of this section, the plan provides a benefit at a uniform percentage of all average annual compensation that is no greater than the excess benefit percentage or the gross benefit percentage under paragraph (c)(2)(iii)(A) of this section.

(iv) *Different social security retirement ages.* The benefit formula uses the same excess benefit percentage or the same gross benefit percentage for all employees with the same number of years of service and, for employees with social security retirement ages later than age 65, adjusts the 0.75-percent factor in

the maximum excess or offset allowance as required under paragraph (e)(1) of this section, by increasing the base benefit percentage in the case of a defined benefit excess plan, or reducing the offset package in the case of an offset plan.

(v) *Reduction for integration level.* The plan uses an integration level or offset level greater than each employee's covered compensation and makes individual reductions in the 0.75-percent factor, as permitted under paragraph (d)(9)(iii)(B) of this section, by increasing the base benefit package in the case of a defined benefit excess plan or reducing the offset percentage in the case of an offset plan.

(vi) *Overall permitted disparity.* The benefit formula provides that, with respect to each employee's years of service after reaching the cumulative permitted disparity limit applicable to the employer under § 1.401(l)–5(c), employer-provided benefits are determined with respect to the employee's total average annual compensation at a rate equal to the lesser of—

(A) The excess benefit percentage or gross benefit percentage applicable to an employee with the same number of years of service, or

(B) The highest percentage permitted under the 133⅓ percent accrual rule of section 411(b)(1)(B).

(vii) *Non-FICA employees.* The plan provides that, in the case of each employee under the plan with respect to whom none of the taxes under section 3111(a), section 3221, or section 1401 is required to be paid, employer-provided benefits are determined with respect to the employee's total average annual compensation at the excess benefit percentage or gross benefit percentage applicable to an employee with the same number of years of service.

(viii) *Average annual compensation adjustment for offset plan.* In the case of each employee whose final average compensation exceeds the employee's average annual compensation, the plan adjusts the offset percentage as required under paragraph (b)(3)(ii) of this section in order to satisfy the maximum offset allowance.

(3) *Examples.* The following examples illustrate this paragraph (c). Unless otherwise provided, the following facts apply. The plan is noncontributory and is the only plan ever maintained by the employer. The plan uses a normal retirement age of 65 and contains no provision that would require a reduction in the 0.75-percent factor under paragraph (b)(2) or (b)(3) of this section. In the case of a defined benefit excess plan, the plan uses each employee's covered compensation as the integration level; in the case of an offset plan, the plan uses each employee's covered compensation as the offset level and provides that an employee's final average compensation is limited to the employee's average annual compensation. Each example discusses the benefit formula applicable to an employee who has a social security retirement age of 65.

Example 1. Plan M is a defined benefit excess plan that satisfies the 133⅓ percent accrual rule of section 411(b)(1)(B). The plan provides a normal retirement benefit of 1.0 percent of average annual compensation up to the integration level, plus 1.65 percent of average annual compensation in excess of the integration level, for each year of service up to 25. The plan also provides a benefit of 1.0 percent of all average annual compensation for each year of service in excess of 25. The disparity provided under the plan is uniform because the plan uses the same base and excess benefit percentages for all employees with the same number of years of service. If the plan formula were the same except that it used a different excess benefit percentage for some of the years of service between one and 25, the disparity under the plan would continue to be uniform.

Example 2. Plan O is a defined benefit excess plan that provides a normal retirement benefit of 50 percent of average annual compensation up to the integration level and 68.75 percent of average annual compensation in excess of the integration level, multiplied by a fraction, the numerator of which is the employee's service, up to 25 years, and the denominator of which is 25. The plan determines an employee's accrued benefit as described in § 1.401(a)(4)–3(b)(5)(i)(B). Under the plan an employee accrues ¹⁄₂₅th of the normal retirement benefit for each of the employee's first 25 years of service. The plan thus provides a base benefit percentage of 2 percent (50 percent × ¹⁄₂₅) and an excess benefit percentage of 2.75 percent (68.75 percent × ¹⁄₂₅ for each of an employee's first 25 years of service and no benefit for years of service after 25. The disparity provided under the plan is not uniform within the meaning of this paragraph (c) because the plan does not satisfy either of the uniform disparity rules for fractional accrual plans under paragraphs (c)(2) (ii) and (iii) of this section.

Example 3. Plan P is an offset plan that provides a normal retirement benefit of 2 percent of average annual compensation for each year of service up to 35, minus 0.75 percent of the final average compensation up to the offset level for each year of service up to 25. The plan determines an employee's accrued benefit under the method described in § 1.401(a)(4)–3(b)(4)(i)(B). Because the formula under the plan provides the same gross benefit percentage and offset percentage for 25 years of service (fewer than 35) and, for years of service after 25 and up to 35, provides a benefit at a uniform rate (equal to the gross benefit percentage) of all average annual compensation, and the plan accrues the benefit ratably, the disparity under the plan is deemed to be uniform under paragraph (c)(2)(iii) of this section.

Example 4. Plan Q is an offset plan that benefits employees with social security retirement ages of 65, 66, and 67. For each year of service up to 35, the plan provides a normal retirement benefit equal to 2 percent of average annual compensation, minus an offset based on the employee's final average compensation up to the offset level. For employees with a social security retirement age of 65, the offset percentage is 0.75 percent; for employees with a social security retirement age of 66, the offset percentage is 0.70 percent; and for employees with a social security retirement age of 67, the offset percentage is 0.65 percent. The disparity under the plan is deemed to be uniform under paragraph (c)(2)(iv) of this section because the plan uses the same gross benefit percentage for all employees and reduces the offset percentage for employees with social security retirement ages of 66 and 67 to comply with the adjustments in the 0.75-percent factor in the maximum excess or offset allowance required under paragraph (e)(1) of this section. (Because Plan Q effectively provides unreduced benefits prior to the social security retirement age for employees with social security retirement ages of 66 and 67, and 0.75-percent factor in the maximum offset allowance must be reduced to 0.70 percent and 0.65 percent, respectively.) Alternatively, Plan Q could satisfy this paragraph (c) if it provided a uniform offset percentage of 0.65 percent for all employees because 0.65 percent is the maximum offset allowance under the plan for an employee with a social security retirement age of 67.

Example 5. Plan R is an offset plan that provides a normal retirement benefit of 2 percent of average annual compensation, minus an offset determined as a percentage of total final average compensation, for each year of service up to 35. For an employee whose final average compensation does not exceed the employee's covered compensation, the offset percentage is 0.75 percent. For an employee whose final average compensation exceeds the employee's covered compensation, the plan reduces the offset percentage, as required by paragraph (d) of this section. The reduced offset percentage is determined by comparing the employee's final average compensation to the employee's covered compensation as permitted under paragraph (d)(9)(iii)(B) of this section. The disparity provided under the plan is deemed uniform under paragraph (c)(2)(v) of this section because the plan uses the same gross benefit package for all employees and makes individual reductions in the 0.75-percent factor, as permitted under paragraph (d)(9)(iii)(B) of this section, by reducing the offset percentage in the case of an employee whose final average compensation exceeds covered compensation.

(d) *Requirements for integration or offset level*—(1) *In general.* The integration level under a defined benefit excess plan or the offset level under an offset plan must satisfy paragraphs

(d)(2), (d)(3), (d)(4), (d)(5) or (d)(6) of this section, as modified by paragraph (d)(7) of this section in the case of a short plan year. Paragraph (d)(8) of this section contains demographic tests that apply to certain defined benefit plans. Paragraph (d)(9) of this section explains certain reductions required in the 0.75-percent factor under paragraph (b)(2) or (b)(3) of this section. Paragraph (d)(10) of this section contains examples. If a reduction applies to the 0.75-percent factor under this paragraph (d), the reduced factor is used for all purposes in determining whether the permitted disparity rules for defined benefit plans are satisfied.

(2) *Covered compensation.* The requirement of this paragraph (d)(2) is satisfied only if the integration or offset level under the plan for each employee is the employee's covered compensation.

(3) *Uniform percentage of covered compensation.* The requirement of this paragraph (d)(3) is satisfied only if—

(i) The integration or offset level under the plan for each employee is a uniform percentage (greater than 100 percent) of each employee's covered compensation,

(ii) In the case of a defined benefit excess plan, the integration level does not exceed the taxable wage base in effect for the plan year, and, in the case of an offset plan, the offset level does not exceed the employee's final average compensation, and

(iii) The plan adjusts the 0.75-percent factor in the maximum excess or offset allowance in accordance with paragraph (d)(9) of this section.

(4) *Single dollar amount.* The requirement of this paragraph (d)(4) is satisfied only if the integration or offset level under the plan for all employees is a single dollar amount (either specified in the plan or determined under a formula specified in the plan) that does not exceed the greater of $10,000 or one-half of the covered compensation of an individual who attains social security retirement age in the calendar year in which the plan year begins. In the case of a calendar year in which no individual could attain social security retirement age, for example, the year 2003, this rule is applied using covered compensation of an individual attaining social security retirement age in the preceding calendar year.

(5) *Intermediate amount.* The requirement of this paragraph (d)(5) is satisfied only if—

(i) The integration or offset level under the plan for all employees is a single dollar amount (either specified in the plan or determined under a formula specified in the plan) that is greater than the highest amount determined under paragraph (d)(4) of this section,

(ii) In the case of a defined benefit excess plan, the single dollar amount does not exceed the taxable wage base in effect for the plan year, and, in the case of an offset plan, the single dollar amount does not exceed the employee's final average compensation,

(iii) The plan satisfies the demographic requirements of paragraph (d)(8) of this section, and

(iv) The plan adjusts the 0.75-percent factor in the maximum excess or offset allowance in accordance with paragraph (d)(9) of this section.

For purposes of this paragraph (d)(5), an offset level of each employee's final average compensation is considered a single dollar amount determined under a formula specified in the plan.

(6) *Intermediate amount safe harbor.* The requirement of this paragraph (d)(6) is satisfied only if—

(i) The integration or offset level under the plan for all employees is a single dollar amount described in paragraph (d)(5) of this section, and

(ii) The 0.75-percent factor in the maximum excess or offset allowance under paragraph (b)(2) or (b)(3) of this section is reduced to the lesser of the adjusted factor determined under paragraph (d)(9) of this section or 80 percent of the otherwise applicable factor under paragraph (b)(2) or (b)(3) of this section, determined without regard to paragraph (d)(9) of this section.

(7) *Prorated integration level for short plan year.* If an accumulation plan uses paragraph (4) of the definition of plan year compensation under § 1.401(a)(4)-12 (i.e., section 414(s) compensation for the period of plan participation) and has a plan year that comprises fewer than 12 months, the integration or offset level under the plan for each employee must be an amount equal to the otherwise applicable integration or offset level described in paragraph (d)(2), (d)(3), (d)(4), (d)(5), or (d)(6) of this section, multiplied by a fraction, the numerator of which is the number of months in the plan year and the denominator of which is 12. No adjustment to the maximum excess or offset allowance is required as a result of the application of this paragraph (d)(7), other than any adjustment already required under paragraph (d)(6) or (d)(9) of this section.

(8) *Demographic requirements*—(i) *In general.* A plan that satisfies the demographic requirements of paragraphs (d)(8)(ii) and (iii) of this section may use an integration level described in paragraph (d)(5) of this section.

(ii) *Attained age requirement.* The requirement of this paragraph (d)(8)(ii) is satisfied only if the average attained age of the nonhighly compensated employees in the plan is not greater than the greater of—

(A) Age 50, or

(B) 5 plus the average attained age of the highly compensated employees in the plan. For purposes of this paragraph (d)(8)(ii), attained ages are determined as of the beginning of the plan year.

(iii) *Nondiscrimination requirement.* The requirement of this paragraph (d)(8)(iii) is satisfied only if at least one of the following three tests is satisfied.

(A) *Minimum percentage test.* This test is satisfied only if more than 50 percent of the nonhighly compensated employees in the plan have average annual compensation at least equal to 120 percent of the integration or offset level.

(B) *Ratio test.* This test is satisfied only if the percentage of nonhighly compensated nonexcludable employees, who are in the plan and who have average annual compensation at least equal to 120 percent of the integration or offset level, is at least 70 percent of the percentage of highly compensated nonexcludable employees who are employees in the plan.

(C) *High dollar amount test.* This test is satisfied only if the integration or offset level exceeds 150 percent of the covered compensation of an individual who attains social security retirement age in the calendar year in which the plan year begins. In the case of a calendar year in which no individual could attain social security retirement age, for example, the year 2003, this rule is applied using covered compensation of an individual attaining social security retirement age in the preceding calendar year.

(9) *Reduction in the 0.75-percent factor if integration or offset level exceeds covered compensation*—(i) *In general.* If the integration or offset level specified under the plan is each employee's covered compensation as of the plan year, no reduction in the 0.75-percent factor in the maximum excess or offset allowance is required for the plan year under this paragraph (d)(9). If a plan specifies an integration or offset level that exceeds an employee's covered compensation, the 0.75-percent factor in the maximum excess or offset allowance must be reduced as required in paragraph (d)(9)(ii) or (iii) of this section. Paragraph (d)(9)(iv) of this section contains a table of the applicable reductions.

(ii) *Uniform percentage of covered compensation.* If a plan specifies an

integration or offset level that is a uniform percentage (in excess of 100 percent) of each employee's covered compensation, the 0.75-percent factor in the maximum excess or offset allowance must be reduced in accordance with the table in paragraph (d)(9)(iv) of this section. Thus, for example, if a plan specified an integration or offset level of 120 percent of each employee's covered compensation, the 0.75-percent factor in the maximum excess or offset allowance must be reduced to 0.69 percent in accordance with the table because the specified integration or offset level is more than covered compensation but not more than 125 percent of covered compensation.

(iii) *Single dollar amount.* If a plan specifies an integration or offset level of a single dollar amount as permitted under paragraph (d)(5) of this section (for example, $30,000), the applicable reduction in the maximum excess or offset allowance must be determined under paragraph (d)(9)(iii) (A) or (B) of this section, as specified under the plan.

(A) *Plan-wide reduction.* The applicable reduction in the maximum excess or offset allowance under the table in paragraph (d)(9)(iv) of this section may be determined by comparing the single dollar amount specified in the plan to the covered compensation of an individual attaining social security retirement age in the calendar year in which the plan year begins. Thus, for example, if a plan specifies a single integration or offset level of $30,000 that is uniformly applicable to all employees for a plan year and the covered compensation of an individual attaining social security retirement age in the calendar year in which the plan year begins is $20,000, the 0.75-percent factor in the maximum excess allowance must be reduced to 0.60 percent for all employees in accordance with the table in paragraph (d)(9)(iv) of this section because the specified integration or offset level of $30,000 is more than 125 percent of $20,000 but not more than 150 percent of $20,000. In the case of a calendar year in which no individual could attain social security retirement age (for example, 2003), the comparison is made with covered compensation of an individual who attained social security retirement age in the preceding calendar year. If an offset plan uses an offset level of each employee's final average compensation, the reduction under this paragraph (d)(9)(iii)(A) is determined by comparing the highest possible amount of final average compensation to the covered compensation of an individual attaining social security retirement age in the calendar year in which the plan year begins.

(B) *Individual reductions.* The applicable reduction in the maximum excess or offset allowance under the table in paragraph (d)(9)(iv) of this section may be determined by comparing the single dollar amount specified in the plan to the covered compensation of each employee under the plan. Thus, for example, if a plan specified a single integration or offset level of $30,000 that is uniformly applicable to all employees for a plan year, the 0.75-percent factor in the maximum excess or offset allowance must be reduced to 0.60 percent for an employee with covered compensation of $20,000, but need not be reduced for an employee whose covered compensation is $30,000 or greater.

(iv) *Reductions*—(A) *Table.*

TABLE

If the integration or offset level is	The permitted disparity factor is
100 percent of covered compensation.	0.75 percent
125 percent of covered compensation.	0.69 percent
150 percent of covered compensation.	0.60 percent
175 percent of covered compensation.	0.53 percent
200 percent of covered compensation.	0.47 percent
the taxable wage base or final average compensation.	0.42 percent

(B) *Interpolation.* If the integration or offset level used under a plan is between the percentages of covered compensation in the table, the permitted disparity factor applicable to the plan can be determined either by straight-line interpolation between the permitted disparity factors in the table or by rounding the integration or offset level up to the next highest percentage of covered compensation in the table.

(10) *Examples.* The following examples illustrate this paragraph (d). Unless otherwise provided, the following facts apply. The plan is noncontributory and is the only plan ever maintained by the employer. The plan uses a normal retirement age of 65 and contains no provision that would require a reduction in the 0.75-percent factor under paragraph (b)(2) or (b)(3) of this section. In the case of an offset plan, the plan provides that an employee's final average compensation is limited to the employee's average annual compensation. Each example discusses the benefit formula applicable to an employee who has a social security retirement age of 65.

Example 1. (a) Plan M is a defined benefit excess plan that uses the calendar year as its plan year. For the 1989 plan year, the plan uses an integration level of $20,000, which is 118 percent of the 1989 covered compensation of $16,968 for an individual reaching social security retirement age in 1989. The plan may use that integration level without satisfying paragraph (d)(8) of this section, provided the adjustment to the 0.75-percent factor required under paragraph (d)(6) of this section is made. That adjustment is the lesser of the factor determined under paragraph (d)(9) of this section or 80 percent of the factor otherwise applicable under paragraph (b)(2) or (b)(3) of this section.

(b) The plan determines the factor under paragraph (d)(9) of this section by comparing the integration level to the covered compensation of an individual attaining social security retirement age in calendar year in which the plan year begins and by rounding the integration level up to 125 percent of that covered compensation amount. The 0.75-percent factor is therefore replaced by 0.69 percent pursuant to the table in paragraph (d)(9) of this section. The 0.69 percent factor is 92 percent of the 0.75-percent factor. Because the lesser of 80 percent and 92 percent is 80 percent, the 0.75-percent factor is reduced to 0.6 percent (80 percent of 0.75 percent) under paragraph (d)(6) of this section. The 0.6 percent factor applies to benefits commencing at age 65 for an employee with a social security retirement age of 65. In determining normal retirement benefits for employees with social security retirement ages of 66 or 67, the applicable factors for benefits commencing at age 65 are, respectively, 0.65 percent (80 percent of 0.7 percent) and 0.52 percent (80 percent of 0.65 percent).

(c) The plan could also determine the factor under paragraph (d)(9) of this section by comparing the integration level to the covered compensation of each employee under the plan, or by straight line interpolation between the disparity factors contained in the table in paragraph (d)(9) of this section, or both. (Of course, if the plan satisfied paragraph (d)(8) of this section, the plan could use the factor determined under paragraph (d)(9) of this section.)

Example 2. (a) Plan N, an accumulation plan, is a defined benefit excess plan that, for each year of service up to 35, accrues a normal retirement benefit of 1 percent of plan year compensation up to the taxable wage base, plus 1.75 percent of plan year compensation above the taxable wage base, for each year of service up to 35. An employee's total retirement benefit is the sum of the accruals for all years. The plan satisfies paragraph (d)(8) of this section.

(b) Because the plan uses the taxable wage base (an amount above covered compensation) as the integration level, it must reduce the 0.75-percent factor in the maximum excess allowance as required under paragraphs (d)(5) and (d)(9) of this section. The reduced factor, if determined on a plan-wide bases under paragraph (d)(9)(iii)(A) of this section, is 0.42 percent. The plan must therefore reduce the disparity

in the plan so that it does not exceed 0.42 percent.

Example 3. (a) For the 1990 plan year, Plan O provides a normal retirement benefit of 2 percent of average annual compensation, minus a percentage of final average compensation up to $48,000, for each year of service up to 35. The plan satisfies paragraph (d)(8) of this section. As permitted under paragraph (d)(9) of this section, the plan provides that each employee's offset percentage is determined by comparing $48,000 to the employee's covered compensation and by rounding the result up to the next highest percentage of covered compensation.

(b) Employee A has a social security retirement age of 66 and covered compensation of $40,000. Because the plan provides for commencement of Employee A's benefit at age 65, the 0.75-percent factor in the maximum offset allowance is reduced to 0.7 percent under paragraph (e)(1) of this section (the "paragraph (e) factor"). In addition, because $48,000 is rounded up to 125 percent of Employee A's covered compensation, the 0.75-percent factor in the maximum offset allowance is reduced to 0.69 percent under paragraph (d)(9) of this section (the "paragraph (d) factor"). The reductions are cumulative under paragraph (b)(3)(ii) of this section.

(c) The cumulative reductions can be made by multiplying the paragraph (e) facdtor by the ratio of the paragraph (d) factor to 0.75 percent or by multiplying the paragraph (d) factor by the ratio of the paragraph (e) factor to 0.75 percent. The disparity factor for Employee A is therefore 0.64 percent ((0.7 percent × 0.69 percent/0.75 percent) or (0.69 percent x 0.7 percent/0.75 percent)).

Example (4). Plan P is an offset plan that uses the calendar year as the plan year and uses an offset level of each employee's final average compensation. Assume that the taxable wage bases for 1990–1992 are the following:

1990—$51,300
1991—$53,400
1992—$58,000

Employee B's final average compensation, determined as of the close of the 1992 plan year, is the average of Employee B's annual compensation for the period 1990–1992. Employee B's annual compensation for each year is the following:

1990—$47,000
1991—$59,000
1992—$65,000

For purposes of determining the offset applied to Employee B's employer-provided benefit under the plan, Employee's final average compensation as of the close of the 1992 plan year is $52,800 ($47,000 + $53,400 + $58,000/3. This is because annual compensation in excess of the taxable wage base in effect at the beginning of the year may not be taken into account in determining an employee's final average compensation or in determining the employee's offset. If the plan determines the offset applied to Employee A's benefit by reference to compensation in excess of $52,800, the plan fails to satisfy this paragraph (d).

(e) *Adjustments to the 0.75-percent factor for benefits commencing at ages other than social security retirement age*—(1) *In general.* The 0.75-percent factor in the maximum excess allowance and in the maximum offset allowance applies to a benefit commencing at an employee's social security retirement age. Except as provided in paragraph (e)(4) of this section, if a benefit payable to an employee under a defined benefit excess plan or a defined benefit offset plan commences at an age before the employee's social security retirement age (including a benefit payable at the normal retirement age under the plan), the 0.75-percent factor in the maximum excess allowance or in the maximum offset allowance, respectively, is reduced in accordance with paragraph (e)(2)(i) of this section. If a benefit payable to an employee under a defined benefit excess plan or a defined offset plan commences at an age after the employee's social security retirement age, the 0.75-percent factor in the maximum excess allowance or in the maximum offset allowance, respectively, may be increased in accordance with paragraph (e)(2)(ii) of this section. Paragraph (e)(5) of this section provides rules on the age at which a benefit commences. See paragraph (f) of this section for the requirements applicable to optional forms of benefit.

(2) *Adjustments—(i) Benefits commencing on or after age 55 and before social security retirement age.* If benefits commence before an employee's social security retirement age, the 0.75-percent factor in the maximum excess allowance and in the maximum offset allowance must be reduced for such early commencement of benefits in accordance with the tables set forth in paragraph (e)(3) of this section.

(ii) *Benefits commencing after social security retirement age and on or before age 70.* If benefits commence after an employee's social security retirement age, the 0.75-percent factor in the maximum excess allowance and in the maximum offset allowance may be increased for such delayed commencement of benefits in accordance with the tables set forth in paragraph (e)(3) of this section.

(iii) *Benefits commencing before age 55.* If benefits commence before the employee attains age 55, the 0.75-percent factor in the maximum excess allowance and in the maximum offset allowance is further reduced (on a monthly basis to reflect the month in which benefits commence) to a factor that is the actuarial equivalent of the 0.75-percent factor, as adjusted under the tables in paragraph (e)(3) of this section, applicable to a benefit commencing in the month in which the employee attains age 55. In determining actuarial equivalence for this purpose, a reasonable interest rate must be used. In addition, a reasonable mortality table must be used to determine the actuarial present value, as defined in § 1.401(a)(4)–(12, of the benefits commencing at age 55 and at the earlier commencement age, and a reasonable mortality table may be used to determine the actuarial present value at the earlier commencement age of the benefits commencing at age 55. A standard interest rate and a standard mortality table, as defined in § 1.401(a)(4)–12, are considered reasonable.

(iv) *Benefits commencing after age 70.* If benefits commence after the employee attains age 70, the 0.75-percent factor in the maximum excess allowance and in the maximum offset allowance may be further increased (on a monthly basis to reflect the month in which benefits commence) to a factor that is the actuarial equivalent of the 0.75-percent factor (as adjusted in accordance with this paragraph (e)) applicable to a benefit commencing in the month in which the employee attains age 70. In determining actuarial equivalence for this purpose, a reasonable interest rate must be used. In addition, a reasonable mortality table must be used to determine the actuarial present value, as defined in § 1.401(a)(4)–(12, of the benefits commencing at age 70 and at the later commencement age, and a reasonable mortality table may be used to determine the value at the later commencement age of the benefits commencing at age 70. A standard interest rate and a standard mortality table, as defined in § 1.401(a)(4)–12, are considered reasonable.

(3) *Tables.* Tables I, II, and III provide the adjustments in the 0.75-percent factor in the maximum excess allowance and in the maximum offset allowance applicable to benefits commencing on or after age 55 and on or before age 70 to an employee who has a social security retirement age of 65, 66 or 67. Table IV is a simplified table for a plan that uses a single disparity factor of 0.65 percent for all employees at age 65. The factors in the following tables are applicable to benefits that commence in the month the employee attains the specified age. Accordingly, if benefits commence in a month other than the month in which the employee attains the specified age, appropriate adjustments in the 0.75-percent factor in the maximum excess allowance and the maximum offset

allowance must be made. For this purpose, adjustments may be based on straight-line interpolation from the factors in the tables or in accordance with the methods of adjustment specified in paragraphs (e)(2)(iii) and (iv) of this section.

TABLE I

[Social security retirement age 67]

Age at which benefits commence	Annual factor in maximum excess allowance and maximum offset allowance (percent)
70	1.002
69	0.908
68	0.825
67	0.750
66	0.700
65	0.650
64	0.600
63	0.550
62	0.500
61	0.475
60	0.450
59	0.425
58	0.400
57	0.375
56	0.344
55	0.316

TABLE II

[Social security retirement age 66]

Age at which benefits commence	Annual factor in maximum excess allowance and maximum offset allowance (percent)
70	1.101
69	0.998
68	0.907
67	0.824
66	0.750
65	0.700
64	0.650
63	0.600
62	0.550
61	0.500
60	0.475
59	0.450
58	0.425
57	0.400
56	0.375
55	0.344

TABLE III

[Social security retirement age 65]

Age at which benefits commence	Annual factor in maximum excess allowance and maximum offset allowance (percent)
70	1.209
69	1.096
68	0.996
67	0.905
66	0.824
65	0.750
64	0.700
63	0.650
62	0.600
61	0.550
60	0.500
59	0.475
58	0.450
57	0.425
56	0.400
55	0.375

TABLE IV

[Simplified table]

Age at which benefits commence	Annual factor in maximum excess allowance and maximum offset allowance (percent)
70	1.048
69	0.950
68	0.863
67	0.784
66	0.714
65	0.650
64	0.607
63	0.563
62	0.520
61	0.477
60	0.433
59	0.412
58	0.390
57	0.368
56	0.347
55	0.325

(4) *Exception for certain disability benefits.* The maximum excess allowance and the maximum offset allowance are not subject to the reductions set forth in paragraphs (e)(2)(i) and (iii) of this section solely because the plan provides a temporary disability benefit described in this paragraph (e)(4) commencing before an employee's social security retirement age. However, if a disability benefit commencing before an employee's social security retirement age is payable under the plan and the disability benefit does not meet the definition of a temporary disability benefit in this paragraph (e)(4), the disability benefit will be treated as a benefit described in paragraphs (e)(2)(i) and (iii) of this section and the 0.75-percent factor in the maximum excess allowance or in the maximum offset allowance applicable to the benefit must be reduced in accordance with paragraphs (e)(2)(i) and (iii) of this section. For purposes of this paragraph (e)(4), a disability benefit is a temporary disability benefit only if—

(i) The benefit is payable under the plan solely on account of an employee's disability, as determined by the Social Security Administration,

(ii) The benefit terminates no later than at the employee's normal retirement age,

(iii) The benefit is not in excess of the amount of the benefit that would be payable to the employee under the plan if the employee had separated from service at the employee's normal retirement age, and

(iv) Upon attainment of early or normal retirement age, an employee receives a benefit that satisfies the accrual and vesting rules of section 411 without taking into account the disability benefit payments made up to that age.

(5) *Benefit commencement date*—(i) *In general.* Except as provided in paragraph (e)(5)(ii) of this section, a benefit commences for purposes of this paragraph (e) on the first day of the period for which the benefit is paid under the plan.

(ii) *Qualified social security supplement.* If a plan uses a qualified social security supplement, as defined in § 1.401(a)(4)–12, to provide an aggregate benefit at retirement before social security retirement age that is a uniform percentage of average annual compensation, benefits will be considered to commence on the first day of the period for which the qualified social security supplement is no longer payable. In order for this paragraph (e)(5)(ii) to apply, the uniform percentage must be equal to the excess benefit percentage in the case of an excess plan or the gross benefit percentage in the case of an offset plan.

(6) *Examples.* The following examples illustrate this paragraph (e). Unless otherwise provided, the following facts apply. The plan is noncontributory and is the only plan ever maintained by the employer. The plan uses a normal retirement age of 65 and contains no provision that would require a reduction in the 0.75-percent factor under paragraph (b)(2) or (b)(3) of this section. In the case of a defined benefit excess plan, the plan uses each employee's covered compensation as the integration level; in the case of an offset plan, the plan uses each employee's covered compensation as the offset level and provides that an employee's final average compensation is limited to the employee's average annual compensation. Each example discusses the benefit formula applicable to an employee who has a social security retirement age of 65.

Example 1. Plan M is a defined benefit excess plan that, for an employee with a social security retirement age of 65, provides a normal retirement benefit of 1.25 percent of average annual compensation up to the

integration level, plus 2.0 percent of average annual compensation in excess of the integration level, for each year of service up to 35. For an employee with at least 20 years of service for X, the plan provides a benefit commencing at age 55 that is equal to the benefit payable at age 65. For that employee, the disparity provided under the plan at age 55 is 0.75 percent (2 percent–1.25 percent). Because this disparity exceeds the 0.375 percent factor provided in the table for a benefit payable at age 55 to an employee with a social security retirement age of 65, the plan fails to satisfy paragraphs (b) and (e) of this section with respect to the early retirement benefit.

Example 2. Assume the same facts as in *Example 1,* except that the base benefit percentage under the plan is 1.75 percent. Thus, the disparity provided under the plan at age 55 is 0.25 percent (2 percent–1.75 percent). Because the disparity does not exceed the 0.375 percent factor provided in the table for a benefit payable at age 55 to an employee with a social security retirement age of 65, the plan does not fail to satisfy paragraphs (b) and (e) of this section with respect to the early retirement benefit.

Example 3. Plan N is an offset plan that, for an employee with a social security retirement age of 65, provides a normal retirement benefit of 1.75 percent of average annual compensation, minus 0.75 percent of final average compensation up to the offset level, for each year of service up to 35. For an employee with at least 20 years of service, the plan provides a benefit commencing at age 55 that is equal to the benefit payable at age 65. For that employee, the disparity provided under the plan at age 55 is 0.75 percent. Because this disparity exceeds the 0.375 percent factor provided in the table for an offset applied to a benefit payable at age 55 to an employee with a social security retirement age of 65, the plan fails to satisfy paragraphs (b) and (e) of this section with respect to the early retirement benefit. The plan would not fail to satisfy paragraphs (b) and (e) of this section with respect to the early retirement benefit if the applicable factor for determining the offset applied to the benefit were reduced to 0.375 percent.

Example 4. Plan O is a defined benefit excess plan that, for an employee with a social security retirement age of 65, provides a normal retirement benefit of 1.25 percent of average annual compensation up to the integration level, plus 2.0 percent of average annual compensation in excess of the integration level, for each year of service up to 35. The plan provides benefits commencing before normal retirement age with the following reductions:

Age	Percentage of normal retirement benefit (%)
64	90
63	85
62	80

Under the plan, a benefit payable at age 64 is equal to 90 percent of the normal retirement benefit payable at age 65. Thus, the excess benefit percentage the plan is 1.8 percent, the base benefit percentage under the plan is 1.125 percent, and the disparity provided under the plan at age 64 is 0.675 percent. Similarly, a benefit payable at age 63 is equal to 85 percent of the normal retirement benefit payable at age 65. Thus, the excess benefit percentage under the plan is 1.7 percent, the base benefit percentage under the plan is 1.0625 percent, and the disparity provided under the plan at age 63 is 0.6375 percent. Finally, a benefit payable at age 62 is equal to 80 percent of normal retirement benefit payable at age 65. Thus, the excess benefit percentage under the plan is 1.6 percent, the base benefit percentage under the plan is 1.0 percent, and the disparity provided under the plan at age 62 is 0.6 percent. Because the disparities provided under the plan at each early commencement age do not exceed the factors provided in the applicable table in paragraph (e)(3) of this section, the plan does not fail to satisfy paragraphs (b) and (e) of this section with respect to the early retirement benefits.

Example 5. Plan P is a defined benefit excess plan that provides a normal retirement benefit of 0.75 percent of average annual compensation up to the integration level, plus 1.5 percent of average annual compensation in excess of the integration level, for each year of service up to 35. The plan does not provide any benefits, other than normal retirement benefits, commencing before an employee's social security retirement age. Employee A, born in 1947, has a social security retirement age of 66. Because the plan provides for the distribution of normal retirement benefits before Employee A's social security retirement age, the 0.75-percent factor in the maximum excess allowance applicable to Employee A must be reduced to 0.70 percent in accordance with this paragraph (e). Accordingly, the disparity provided to A under the plan exceeds the maximum excess allowance because the excess benefit percentage (1.5 percent) exceeds the base benefit percentage (0.75 percent) by more than the maximum excess allowance of 0.70 percent, as reduced in accordance with this paragraph (e).

Example 6. Assume the same facts as in *Example 5,* except that the plan also provides an early retirement benefit, commencing at age 62, to an employee who satisfies the conditions for early retirement specified in the plan. The early retirement benefit is based upon the employee's accrued benefit at early retirement age and equals the amount that would have been paid commencing at the employee's normal retirement age based upon the employee's average annual compensation, covered compensation and years of service at the date of the employee's early retirement. Employee B, who has a social security retirement age of 65, meets the conditions for early retirement under the plan and retires at age 62 with 30 years of service. At the time of early retirement, Employee B has average annual compensation of $20,000 and covered compensation of $16,000. Under the plan's benefit formula, Employee B has accrued a normal retirement benefit, commencing at age 65, of $5,400 [(22.5 percent × $16,000) + (45 percent × $4,000)] based on Employee B's average compensation, covered compensation and years of service at early retirement. Accordingly, under the plan's early retirement provisions, Employee B is entitled to receive, commencing at early retirement, a benefit of $5,400. Because the early retirement benefit is a benefit (other than a qualified disability benefit) commencing at age 62 (before Employee B's social security retirement age), the 0.75-percent factor in the maximum excess allowance must be reduced to 0.60 percent in accordance with this paragraph (e). Accordingly, the disparity provided to Employee B under the plan at early retirement exceeds the maximum excess allowance.

Example 7. (a) Plan Q is a defined benefit excess plan that provides a normal retirement benefit of 1.35 percent of average annual compensation up to the integration level, plus 2 percent of average annual compensation in excess of the integration level, for each year of service up to 35. The plan provides that an employee with 10 years of service at age 55 may receive an unreduced retirement benefit. The plan also provides that employee with a supplemental benefit of 0.65 percent of average annual compensation up to the integration level for each year of service up to 35, payable from early retirement until age 65. The supplemental benefit is a qualified social security supplement under § 1.401(a)(4)–12. The effect of the supplement is to provide an employee with a uniform benefit of 2 percent of average annual compensation from early retirement until age 65, when the supplement is no longer payable. Therefore, for purposes of this paragraph (e), the employee's benefit will be considered to commence at age 65.

(b) Assume that Plan Q is instead an offset plan that provides a normal retirement benefit of 2 percent of average annual compensation, minus 0.65 percent of final average compensation up to the offset level, for each year of service up to 35. The plan provides the same early retirement benefit on the same conditions, except that the supplement is 0.65 percent of an employee's final average compensation up to the offset level. An employee at age 55 thus receives a uniform benefit of 2 percent of average annual compensation until age 65, when the supplement is no longer payable. Therefore, for purposes of this paragraph (e), the employee's benefit will be considered to commence at age 65.

(f) *Benefits, rights, and features*—(1) *Defined benefit excess plan.* In the case of a defined benefit excess plan, each benefit, right, or feature provided under the plan with respect to employer-provided benefits attributable to average annual compensation above the integration level (an "excess benefit, right, or feature") must also be provided on the same terms with respect to employer-provided benefits attributable to average annual compensation up to the integration level (a "base benefit, right, or feature"). Alternatively, an excess benefit, right, or feature may be provided on different terms than the base benefit, right, or feature, if the

terms used to determine the base benefit, right, or feature produce a benefit, right, or feature of inherently equal or greater value than the benefit, right, or feature that would be produced under the terms used to determine the excess benefit, right, or feature.

(2) *Offset plan.* In the case of an offset plan, each benefit, right, or feature provided under the plan with respect to employer-provided benefits before application of the offset (a "gross benefit, right, or feature") must be provided on the same terms as those used to determine the offset applied to the gross benefit, right, or feature. Alternatively, a gross benefit, right, or feature may be provided on different terms from those used to determine the offset applied to the gross benefit, right, or feature, if the terms used to determine the gross benefit, right, or feature produce a benefit, right, or feature of inherently equal or greater value than the benefit, right, or feature that would be produced under the terms used to determine the offset applied to the gross benefit, right, or feature. In addition, if benefits commence before an employee's normal retirement age, the gross benefit percentage under the plan must be reduced by a number of percentage points that is not less than the number of percentage points by which the offset percentage must be reduced, from normal retirement age to the age at which benefits commence, under the rules of paragraph (e) of this section.

(3) *Examples.* The following examples illustrate this paragraph (f). Unless otherwise provided, the following facts apply. The plan is noncontributory and is the only plan ever maintained by the employer. The plan uses a normal retirement age of 65 and contains no provision that would require a reduction in the 0.75-percent factor under paragraph (b)(2) or (b)(3) of this section. In the case of a defined benefit excess plan, the plan uses each employee's covered compensation as the integration level; in the case of an offset plan, the plan uses each employee's covered compensation as the offset level and provides that an employee's final average compensation is limited to the employee's average annual compensation. Each example discusses the benefit formula applicable to an employee who has a social security retirement age of 65. All optional forms of benefit under each plan are provided on the same terms.

Example 1. Plan M is a defined benefit excess plan that provides a normal retirement benefit of 1 percent of average annual compensation up to the integration level, plus 1.65 percent of average annual compensation above the integration level, for each year of service up to 35. The plan provides an early retirement benefit for any employee who terminates employment at or after age 55 with 10 or more years of service. In determining an employee's early retirement, the 1.65 percent excess benefit percentage is reduced in accordance with the table in paragraph (e)(3) of this section for a plan that uses a single disparity factor of 0.65 percent for all employees at age 65. However, a larger reduction factor is applied to determine the base benefit percentage at early retirement. The plan violates this paragraph (f) because the excess early retirement benefit is not provided on the same terms as the base early retirement benefit, nor do the terms used to determine the base early retirement benefit produce an early retirement benefit of inherently equal or greater value than the early retirement benefit that would be produced under the terms used to determine the excess benefit, right, or feature.

Example 2. The facts are the same as in *Example 1* except that the plan determines the early retirement benefit by applying the same reduction factors under paragraph (e)(3) of this section to the base and excess benefit percentages. Furthermore, if an employee terminates employment at or after age 55 with 30 or more years of service, the plan provides that the base benefit percentage of 1 percent is not reduced. Although the excess early retirement benefit is provided on different terms than the base early retirement benefit, the plan satisfies this paragraph (f) because the terms used to determine the base early retirement benefit produce an early retirement of inherently equal or greater value than the early retirement benefit that would be produced under the terms used to determine the excess benefit, right, or feature.

Example 3. Plan N is an offset plan that provides a normal retirement benefit of 2 percent of average annual compensation, minus 0.65 percent of final average compensation up to the offset level, for each year of service up to 35. In determining the qualified joint and survivor ("QJSA") form of the normal retirement benefit, the plan applies a factor of 80 percent to the gross benefit percentage and a factor of 100 percent to the offset percentage. Thus, the QJSA form is 1.6 percent of average annual compensation, minus 0.65 percent of final average compensation up to the offset level, for each year of service up to 35. The plan violates this paragraph (f) because the gross QJSA form is not provided on the same terms as the terms used to determine the offset applied to the QJSA, nor does it produce a QJSA benefit that is of inherently equal or greater value than the QJSA benefit that would be produced under the terms used to determine the offset under the plan.

Example 4. Plan O is a defined benefit excess plan that provides a normal retirement benefit of 1 percent of average annual compensation up to the integration level, plus 1.65 percent of average annual compensation above the integration level, for each year of service up to 35. The plan also provides a single sum optional form of benefit determined by applying a single interest rate and mortality assumption to the entire normal retirement benefit. The plan satisfies this paragraph (f) because the excess optional form is provided on the same terms as the base optional form. The plan would also satisfy this paragraph (f) if it used a lower interest rate to determine the base optional form than used to determine the excess optional form because the lower interest rate would produce an optional form of inherently equal or greater value than the optional form produced by using the same interest rate.

Example 5. Plan R is a defined benefit excess plan that provides a normal retirement benefit of 1 percent of average annual compensation up to the integration level, plus 1.65 percent of average annual compensation above the integration level, for each year of service up to 35. If an employee continues to work after normal retirement age, the plan provides that the employee receives credit for additional years of service up to the service limit of 35. The plan also provides that the disparity provided under the plan will increase as permitted under paragraph (e) of this section for benefits commencing after social security retirement age. However, the plan does not provide an increase in the base benefit percentage to reflect the fact that the employee has delayed commencement of benefits past normal retirement age. Thus, for example, for an employee at age 68, the plan provides a benefit of 1 percent of average annual compensation up to the integration level, plus 1.86 percent of average annual compensation above the integration level, for each year of service up to 35. The plan violates this paragraph (f) because the excess benefit provided for an employee after normal retirement age is not provided on the same terms as the base benefit, nor do the terms used to determine the base benefit produce a benefit of inherently equal or greater value than the benefit that would be produced under the terms used to determine the excess benefit.

Example 6. Plan Q is an offset plan that provides a normal retirement benefit of 2 percent of average annual compensation, minus 0.65 percent of final average compensation up to the offset level, for each year of service up to 35. In accordance with paragraph (e) of this section, the plan reduces the offset percentage under the plan for early retirement and provides a benefit at age 55 of 2 percent of average annual compensation, minus 0.325 percent of final average compensation up to the offset level, for each year of service up to 35. However, the early retirement benefit does not meet this paragraph (f) because an employee's gross benefit percentage is not reduced for early retirement.

Example 7. The facts are the same as in *Example 6* except that the plan reduces the gross benefit percentage for early retirement at age 55 to 1.675 percent. Because the gross benefit percentage is reduced by 0.325 percent (from 2.0 percent to 1.675 percent), the same percentage point reduction made in the offset percentage (from 0.65 percent to 0.325 percent), the early retirement benefit meets this paragraph (f).

(g) *No reductions in 0.75-percent factor for death benefits.* For purposes

of applying the maximum excess allowance described in paragraph (b)(2) of this section and the maximum offset allowance described in paragraph (b)(3) of this section, no reduction is made to the 0.75-percent factor in the maximum excess allowance or in the maximum offset allowance solely because the plan provides disparity in death benefits that are unrelated to retirement benefits and are payable before an employee's social security retirement age.

(h) *Benefits attributable to employee contributions not taken into account.* Benefits attributable to employee contributions to a defined benefit excess plan or to an offset plan are not taken into account in determining whether the disparity provided under a defined benefit excess plan or an offset plan exceeds the maximum permitted disparity described in paragraph (b) of this section. Therefore, the base benefit percentage and the excess benefit percentage under a defined benefit excess plan for the plan year are reduced to the extent that benefits are attributable to employee contributions. Similarly, the gross benefit percentage under a defined benefit offset plan for the plan year is reduced to the extent the benefit is attributable to employee contributions. See § 1.401(a)(4)–6(b) for methods of determining the employer-provided benefit under a plan that includes employee contributions not allocated to separate accounts (i.e., contributory DB plan).

(i) *Multiple integration levels*—[Reserved].

(j) *Additional rules.* The Commissioner may, in revenue rulings, notices or other documents of general applicability, prescribe additional rules as may be necessary or appropriate to carry out the purposes of this section, including updated tables under paragraphs (d) and (e) of this section providing for reductions in the 0.75-percent factor in the maximum excess allowance and in the maximum offset allowance and rules in paragraph (h) of this section for determining the portion of an employee's benefit attributable to employee contributions.

§ 1.401(l)–4 Special rules for railroad plans.

(a) *In general.* Section 401(l)(6) provides that, in the case of a plan maintained by a railroad employer that covers employees who are entitled to benefits under the Railroad Retirement Act of 1974, in determining whether such a plan satisfies section 401(l), rules similar to the rules under section 401(l) apply and such rules take into account the employer-derived portion of tier 2 and supplemental annuity benefits provided under the railroad retirement system. In general, for purposes of determining whether a defined contribution plan or a defined benefit plan maintained by a railroad employer and covering employees described in the preceding sentence, satisfies section 401(l), the employer-derived portion of an employee's tier 2 benefits and supplementary annuity benefits under the Railroad Retirement Act of 1974 are treated as though such benefits were provided by the railroad employer under a qualified plan. Paragraph (b) of this section contains rules for defined contribution plans. Paragraph (c) of this section contains rules for defined benefit excess plans. Paragraph (d) of this section contains rules for offset plans. Paragraph (e) of this section contains definitions and additional rules of application.

(b) *Defined contribution plans*—(1) *In general.* A defined contribution plan maintained by a railroad employer satisfies section 401(l) and § 1.401(l)–2 for a plan year only if the plan satisfies paragraph (b)(2) or (b)(3) of this section for the plan year.

(2) *Single integration level method*—(i) *In general.* A plan satisfies this paragraph (b)(2) if—

(A) The plan specifies a single integration level for all employees that does not exceed the railroad retirement taxable wage base in effect as of the beginning of the plan year,

(B) The plan uses the same base contribution percentage and the same excess contribution percentage for all employees, and

(C) The excess contribution percentage does not exceed the sum of 11.4 percentage points and the base contribution percentage.

(ii) *Definitions.* The following definitions govern for purposes of this paragraph (b)(2).

(A) *Base contribution percentage* means the rate at which employer contributions are allocated to the account of an employee under the plan with respect to the employee's plan year compensation at or below the railroad retirement taxable wage base (expressed as a percentage of such plan year compensation).

(B) *Excess contribution percentage* means the rate at which employer contributions are allocated to the account of an employee under the plan with respect to the employee's plan year compensation above the railroad retirement taxable wage base (expressed as a percentage of such plan year compensation).

(3) *Two integration level method*—(i) *In general.* A plan satisfies this paragraph (b)(3) if—

(A) The plan specifies two integration levels for all employees, equal to the railroad retirement taxable wage base in effect as of the beginning of the plan year and the taxable wage base in effect as of the beginning of the plan year, and

(B) The plan satisfies paragraphs (b)(3) (ii) and (iii) of this section.

(ii) *Total disparity requirement.* A plan satisfies this paragraph (b)(3)(ii) if—

(A) The plan uses the same base contribution percentage and the same excess contribution percentage for all employees, and

(B) The excess contribution percentage does not exceed the sum of 11.4 percentage points and the base contribution percentage.

(iii) *Intermediate disparity requirement.* A plan satisfies this paragraph (b)(3)(iii) if—

(A) The plan uses the same base contribution percentage and the same intermediate contribution percentage for all employees, and

(B) The intermediate contribution percentage does not exceed the sum of 5.7 percentage points and the base contribution percentage.

(iv) *Definitions.* The following definitions govern for purposes of this paragraph (b)(3).

(A) *Base contribution percentage* means the rate at which employer contributions are allocated to the account of an employee under the plan with respect to the employee's plan year compensation at or below the railroad retirement taxable wage base (expressed as a percentage of such plan year compensation).

(B) *Intermediate contribution percentage* means the rate at which employer contributions are allocated to account of an employee under the plan with respect to the employee's plan year compensation between the railroad retirement taxable wage base and the taxable wage base (expressed as a percentage of such plan year compensation).

(C) *Excess contribution percentage* means the rate at which employer contributions are allocated to the account of an employee under the plan with respect to the employee's plan year compensation above the taxable wage base (expressed as a percentage of such plan year compensation).

(c) *Defined benefit excess plans*—(1) *In general.* A defined benefit excess plan maintained by a railroad employer satisfies section 401(l) and § 1.401(l)–3 for a plan year only if the plan satisfies paragraph (c)(2) or (c)(3) of this section for the plan year.

(2) *Single integration level method*—(i) *In general.* A plan satisfies this paragraph (c)(2) if—

(A) The plan specifies a single integration level for all employees that does not exceed railroad retirement covered compensation,

(B) The plan uses the same base benefit percentage and the same excess benefit percentage for all employees, and

(C) The excess benefit percentage does not exceed the lesser of—

(*1*) Two times the sum of 0.56 percent and the base benefit percentage, or

(*2*) 0.56 percent plus the base benefit percentage plus 0.75 percent.

(ii) *Definitions.* The following definitions govern for purposes of this paragraph (c)(2).

(A) *Base benefit percentage* means the rate at which employer-provided benefits are determined under the plan with respect to an employee's average annual compensation at or below the employee's railroad retirement covered compensation (expressed as a percentage of such average annual compensation).

(B) *Excess benefit percentage* means the rate at which employer-provided benefits are determined under the plan with respect to an employee's average annual compensation above the employee's railroad retirement covered compensation (expressed as a percentage of such average annual compensation).

(3) *Two integration level method*—(i) *In general.* A plan satisfies this paragraph (c)(3) for a plan year if—

(A) The plan specifies two integration levels for all employees, equal to each employee's railroad retirement covered compensation and each employee's covered compensation, and

(B) The plan satisfies paragraph (c)(3)(ii) and (iii) of this section.

(ii) *Employee with lower covered compensation.* A plan satisfies this paragraph (c)(3)(ii) if, with respect to each employee whose lower integration level is the employee's covered compensation—

(A) The plan uses the same base benefit percentage and the same intermediate benefit percentage for all employees,

(B) The intermediate benefit percentage does not exceed the base benefit percentage by more than the lesser of 0.75 percent or the base benefit percentage,

(C) The plan uses the same intermediate benefit percentage and the same excess benefit percentage by an amount for all employees, and

(D) The excess benefit percentage does not exceed the intermediate benefit percentage by more than 0.56 percent.

(iii) *Employee with lower railroad retirement covered compensation.* A plan satisfies this paragraph (c)(3)(iii) if, with respect to each employee whose lower integration level is the employee's railroad retirement covered compensation—

(A) The plan uses the same base benefit percentage and the same excess benefit percentage for all employees.

(B) The excess benefit percentage does not exceed the lesser of—

(*1*) Two times the sum of 0.56 percent and the base benefit percentage, or

(*2*) The sum of 0.56 percent plus the base benefit percentage plus 0.75 percent,

(C) The plan uses the same the base benefit percentage and the same intermediate benefit percentage for all employees, and

(D) The intermediate benefit percentage does not exceed the sum of 0.56 percent plus the base benefit percentage.

(iv) *Definitions.* The following definitions govern for purposes of this paragraph (c)(3).

(A) *Base benefit percentage* means the rate at which employer-provided benefits are determined under the plan with respect to an employee's average annual compensation at or below the lower integration level specified in the plan (expressed as a percentage of such average annual compensation).

(B) *Intermediate benefit percentage* means the rate at which employer-provided benefits are determined under the plan with respect to an employee's average annual compensation between the lower and higher integration levels specified in the plan (expressed as a percentage of such average annual compensation).

(C) *Excess benefit percentage* means the rate at which employer-provided benefits are determined under the plan with respect to an employee's average annual compensation above the higher integration level specified in the plan (expressed as a percentage of such average annual compensation).

(d) *Offset plans*—(1) *In general.* An offset plan maintained by a railroad employer satisfies section 401(l) and § 1.401(l)–3 for a plan year only if—

(i) The plan satisfies § 1.401(l)–3 for the plan year without regard to the offset for the employer-derived portion of tier 2 and supplementary annuity benefits provided under the railroad retirement system, and

(ii) the offset for the employer-derived portion of tier 2 and supplementary annuity benefits provided under the railroad retirement system does not exceed the maximum tier 2 and supplementary annuity offset allowance.

(2) *Maximum tier 2 and supplementary annuity offset allowance.* For purposes of paragraph (d)(1) of this section, the maximum tier 2 and supplementary annuity offset allowance for a plan year is equal to 0.56 percent of the employee's railroad retirement covered compensation for the plan year.

(e) *Additional rules*—(1) *Definitions.* The following definitions govern for purposes of this section.

(i) *Railroad retirement taxable wage base* means the applicable base, as determined under section 3231(e)(2)B)(ii), for purposes of the tax under section 3221(b) (the tier 2 tax).

(ii) *Railroad retirement covered compensation* for an employee means 12 multiplied by the average of the 60 highest monthly railroad taxable wage bases in effect for the employee's period of employment. The monthly railroad taxable wage base is determined by dividing the railroad taxable wage base for the calendar year in which the month occurs by 12. An employee's railroad retirement covered compensation for the plan year is determined as of the beginning of the plan year. A plan must provide that an employee's railroad retirement covered compensation is automatically adjusted for each plan year. See § 1.401(l)–1(b) for rules relating to prohibited decreases in an employee's accrued benefit within the meaning of section 411(d)(6) or section 411(b)(1)(G).

(2) *Adjustments to 0.75-percent factor.* The 0.75-percent factor in the maximum excess allowance and in the maximum offset allowance is subject to the reductions prescribed in § 1.401(l)–3 (d) and (e), except that in the case of an employee with at least 30 years of service with a railroad employer, the following tables are substituted for Tables I through III contained in § 1.401(l)–3(e)(3).

TABLE I

[Social security retirement age 67]

Age at which benefits commence	Annual factor in maximum excess allowance and maximum offset allowance (percent)
66	0.750
65	0.750
64	0.750
63	0.750
62	0.750
61	0.525
60	0.525
59	0.508
58	0.490
57	0.472

TABLE I—Continued

[Social security retirement age 67]

Age at which benefits commence	Annual factor in maximum excess allowance and maximum offset allowance (percent)
56	0.433
55	0.398

TABLE II

[Social security retirement age 66]

Age at which benefits commence	Annual factor in maximum excess allowance and maximum offset allowance (percent)
65	0.750
64	0.750
63	0.750
62	0.750
61	0.563
60	0.563
59	0.544
58	0.525
57	0.506
56	0.488
55	0.447

TABLE III

[Social security retirement age 65]

Age at which benefits commence	Annual factor in maximum excess allowance and maximum offset allowance (percent)
64	0.750
63	0.750
62	0.750
61	0.600
60	0.600
59	0.580
58	0.560
57	0.540
56	0.520
55	0.500

(3) *Adjustments to 0.56-percent factor.* The 0.56-percent factor for defined benefit excess plan and offset plans under paragraphs (c) and (d) of this section respectively is subject to the reductions prescribed in § 1.401(l)–3 (d) and (e), except that, for purposes of applying this paragraph (e)(3)—

(i) "Railroad retirement compensation" is substituted for "covered compensation" in § 1.401(l)–3(d).

(ii) The reductions under § 1.401(l)–3(d) are made by multiplying the 0.56 factor by the ratio of the applicable factor from the table in § 1.401(l)–(3)(d)(9)(iv)(A) to 0.75, and

(iii) The following tables are substituted for Tables I through III set forth in § 1.401(l)–3(e)(3).

(A) Tables applicable to 0.56% factor for employees covered by tier 2 of railroad retirement with 30 or more years of railroad service.

TABLE I

[Social security retirement age 67]

Age at which benefits commence	Annual factor in maximum excess allowance and maximum offset allowance (percent)
66	0.560
65	0.560
64	0.560
63	0.560
62	0.560
61	0.560
60	0.560
59	0.541
58	0.523
57	0.504
56	0.462
55	0.425

TABLE II

[Social security retirement age 66]

Age at which benefits commence	Annual factor in maximum excess allowance and maximum offset allowance (percent)
65	0.560
64	0.560
63	0.560
62	0.560
61	0.560
60	0.560
59	0.541
58	0.523
57	0.504
56	0.485
55	0.445

TABLE III

[Social security retirement age 65]

Age at which benefits commence	Annual factor in maximum excess allowance and maximum offset allowance (percent)
64	0.560
63	0.560
62	0.560
61	0.560
60	0.560
59	0.541
58	0.523
57	0.504
56	0.485
55	0.467

(B) Tables applicable to 0.56% factor for employees covered by tier 2 of railroad retirement with less than 30 years of railroad service.

TABLE I

[Social security retirement age 67]

Age at which benefits commence	Annual factor in maximum excess allowance and maximum offset allowance (percent)
66	0.523
65	0.485
64	0.448
63	0.420
62	0.392
61	0.379
60	0.366
59	0.353
58	0.340
57	0.327
56	0.300
55	0.275

TABLE II

[Social security retirement age 66]

Age at which benefits commence	Annual factor in maximum excess allowance and maximum offset allowance (percent)
65	0.523
64	0.485
63	0.448
62	0.420
61	0.392
60	0.378
59	0.364
58	0.350
57	0.336
56	0.322
55	0.295

TABLE III

[Social security retirement age 65]

Age at which benefits commence	Annual factor in maximum excess allowance and maximum offset allowance (percent)
64	0.523
63	0.485
62	0.448
61	0.418
60	0.388
59	0.373
58	0.358
57	0.343
56	0.329
55	0.314

(4) *Overall permitted disparity.* The overall permitted disparity rules of § 1.401(l)–5 apply to employees who benefit under a plan maintained by a railroad employer.

§ 1.401(l)–5 Overall permitted disparity limits.

(a) *Introduction*—(1) *In general.* The maximum excess allowance and maximum offset allowance limit the disparity that can be provided under a plan for a plan year. The overall

permitted disparity rules apply to limit the disparity provided for a plan year if an employee benefits under more than one plan maintained by the employer (the "annual overall permitted disparity limit") and to limit the disparity provided for an employee's total years of service, either in a single plan or in more than one plan of the employer (the "cumulative overall permitted disparity limit"). The overall permitted disparity rules take into account the disparity provided under a section 401(l) plan and the permitted disparity imputed under a plan that satisfies section 401(a)(4) by relying on § 1.401(a)(4)–7. A plan that is not a section 401(l) plan is generally deemed to impute permitted disparity under § 1.401(a)(4)–7 unless established otherwise. Paragraph (b) of this section provides rules on the annual overall permitted disparity limit. Paragraph (c) of this section provides rules on the cumulative overall permitted disparity limit.

(2) *Plan requirements.* In order to satisfy section 401(l), a plan must provide that the overall permitted disparity limits may not be exceeded and must specify how employer-provided contributions or benefits under the plan are adjusted, if necessary, to satisfy the overall permitted disparity limits. Any adjustments made to satisfy the overall permitted disparity limits must be made in a uniform manner for all employees.

(3) *Plans taken into account.* For purposes of this section, all plans of the employer are taken into account. In addition, all plans of any other employer are taken into account for all periods of service with the other employer for which the employee receives credit for purposes of benefit accrual under any plan of the current employer.

(b) *Annual overall permitted disparity limit*—(1) *In general.* If, in the plan year, an employee benefits under more than one plan, the annual overall permitted disparity limit is satisfied only if the employee's total annual disparity fraction, as defined in paragraph (b)(2) of this section, does not exceed one. Paragraphs (b)(3) through (b)(8) of this section explain the determination of an employee's annual disparity fractions. Paragraph (b)(9) of this section provides examples.

(2) *Total annual disparity fraction.* An employee's total annual disparity fraction is the sum of the employee's annual disparity fractions, as defined in paragraphs (b)(3) through (b)(7) of this section. An employee's total annual disparity fraction is determined as of the end of the current plan year, based on the employee's annual disparity fractions under all plans with plan years ending in the current plan year.

(3) *Annual defined contribution plan disparity fraction.* For a plan year, the annual defined contribution plan disparity fraction for an employee benefiting under a defined contribution plan that is a section 401(l) plan is a fraction—

(i) The numerator of which is the disparity provided under the plan for the plan year, and

(ii) The denominator of which is the maximum excess allowance under § 1.401(l)–2(b)(2) for the plan year.

(4) *Annual defined benefit excess plan disparity fraction.* For a plan year, the annual defined benefit excess plan disparity fraction for an employee benefiting under a defined benefit excess plan that is a section 401(l) plan is a fraction—

(i) The numerator of which is the disparity provided under the plan for the plan year, and

(ii) The denominator of which is the maximum excess allowance under § 1.401(l)–3(b)(2) for the plan year.

(5) *Annual offset plan disparity fraction.* For a plan year, the annual offset plan disparity fraction for an employee benefiting under an offset plan that is a section 401(l) plan is a fraction—

(i) The numerator of which is the disparity provided under the plan for the plan year, and

(ii) The denominator of which is the maximum offset allowance under § 1.401(l)–3(b)(3) for the plan year.

(6) *Annual imputed disparity fraction.* For a plan year, the annual imputed disparity fraction for an employee benefiting under a plan that imputes permitted disparity with respect to the employee under § 1.401(a)(4)–7 is one.

(7) *Annual nondisparate fraction.* For a plan year, the annual nondisparate fraction for an employee benefiting under a plan that neither is a section 401(l) plan nor imputes permitted disparity under § 1.401(a)(4)–7 is zero.

(8) *Determination of fraction*—(i) *General rule.* A separate annual disparity fraction is generally determined for each plan under which the employee benefits. Thus, for example, if two plans are aggregated and treated as a single plan for purposes of section 401(a)(4), a single annual disparity fraction applies to the aggregated plan.

(ii) *Multiple formulas.* If a plan provides an allocation or benefit equal to the sum of two or more formulas, each formula is considered a separate plan for purposes of this section. If a plan provides an allocation or benefit equal to the greater of two or more formulas, an annual disparity fraction is calculated for the employee under each formula and the largest of the fractions is the employee's annual disparity fraction under the plan.

(iii) *Offset arrangements*—(A) *In general.* If an employee benefits under two plans of the employer described in paragraph (b)(8)(iii)(B) or (C) of this section, the employee's annual disparity fraction under both plans is the larger of the annual disparity fractions calculated separately under each plan.

(B) *Defined benefit plans.* The employee's employer-provided accrued benefit under a defined benefit plan is offset by the employee's total employer-provided accrued benefit under another defined benefit plan or by the actuarial equivalent (as defined in § 1.401(a)(4)–12) of the employee's total account balance under a defined contribution plan that is attributable to employer contributions.

(C) *Defined contribution plans.* The amount allocated to the employee's account under a defined contribution plan is offset by the total amount allocated to the employee's account under another defined contribution plan.

(iv) *Applicable percentages.* The disparity provided under a plan is determined on the base and excess percentages under an excess plan and the offset percentage under an offset plan, regardless of whether the employee's plan year or average annual compensation exceeds the integration or offset level under the plan.

(9) *Examples.* The following examples illustrate this paragraph (b). Except as otherwise provided, each plan is a section 401(l) plan.

Example 1. (a) Employee A benefits for the plan year under a defined contribution excess plan, Plan X, and a defined benefit excess plan, Plan Y, of the employer. Plans X and Y have the same plan year. Employee A benefits under no other plan of the employer for the plan year of any other plan ending in the plan year of Plans X and Y. Plan X provides a base contribution percentage of 5 percent and an excess contribution percentage of 7 percent, thus providing Employee A with disarity of 2 percent for the plan year. The maximum excess allowance for the plan year under Plan X is 5 percent. Plan Y provides a base benefit percentage of 1 percent and an excess benefit percentage of 1.35 percent, thus providing Employee A with disparity of 0.35 percent for the plan year. The maximum excess allowance for the plan year under Plan Y is 0.75 percent.

(b) Employee A's annual defined contribution plan disparity fraction under Plan X for the plan year is 0.4 (2 percent divided by 5 percent). Employee A's annual defined benefit excess plan disparity fraction under Plan Y for the plan year is 0.47 (0.35

percent divided by 0.75 percent). Employee A's total annual disparity fraction is the sum of 0.4 and 0.47 or 0.87. Because Employee A's total annual disparity fraction does not exceed one, the plans satisfy the annual overall permitted disparity limit with respect to Employee A for the plan year.

Example 2. (a) The facts are the same as in *Example 1*, except that Plan Y is a defined contribution plan, rather than a defined benefit plan. Plan X and Plan Y cover the same employees and are identical in their terms except for the base and excess contribution percentages provided under the plans. Plan Y provides a base contribution percentage of 3 percent and an excess contribution percentage of 6 percent, thus providing Employee A with disparity of 3 percent for the plan year. The maximum excess allowance for the plan year under Plan Y is 3 percent.

(b) Employee A's annual defined contribution plan disparity fraction under Plan X for the plan year is 0.4 (2 percent divided by 5 percent). Employee A's annual defined contribution plan disparity fraction under Plan Y for the plan year is 1 (3 percent divided by 3 percent). Because Employee A's total annual disparity fraction (the sum of 0.4 and 1 or 1.4) exceeds one, the plans do not satisfy the annual overall permitted disparity requirements with respect to Employee A for the plan year.

(c) Plan X and Plan Y are aggregated for purposes of section 401(a)(4) and form a single section 401(l) plan. Under the plan, the base contribution percentage is 8 percent (5 percent plus 3 percent), and the excess contribution percentage is 13 percent (7 percent plus 6 percent). A single annual defined contribution plan disparity fraction is determined for Employee A for the plan year, the numerator of which is the disparity of 5 percent provided under the plan (13 percent minus 8 percent), and the denominator of which is 5.7 percent, the maximum excess allowance that applies to the plan. Because Employee A's only annual disparity fraction of 0.88 (5 percent divided by 5.7 percent) does not exceed one, Employee A's total annual disparity fraction also does not exceed one. The plan thus satisfies the annual overall permitted disparity limit with respect to Employee A for the plan year.

Example 3. Assume the same facts as in *Example 2*, except that Plan X and Plan Y use different integration levels. Therefore, when Plan X and Plan Y are aggregated to form a single plan for purposes of section 401(a)(4), the single plan does not satisfy section 401(l). In applying the general test of § 1.401(a)(4)–2(c), the plan imputes disparity under § 1.401(a)(4)–7. Employee A's only annual disparity fraction is the annual imputed disparity fraction of one. Employee A's total annual disparity fraction is also one, and the plan satisfies the annual overall permitted disparity limit with respect to Employee A for the plan year.

Example 4. (a) Employee B participates in two plans: Plan M, which is a section 401(l) plan, and Plan N, which is subject to the general test under § 1.401(a)(4)–3(b). Plan M provides that the disparity provided an employee for the plan year will be reduced to the extent necessary to satisfy the annual overall permitted disparity limits. The employer wishes to impute permitted disparity under § 1.401(a)(4)–7 in order for Plan N to satisfy section 401(a)(4). Employee B's imputed disparity fraction under Plan N is therefore one, and Plan M provides no disparity provided for Employee B for the plan year. As a result, Plan M provides disparity that is neither uniform nor deemed uniform under § 1.401(l)–3(c); Plan M therefore does not satisfy section 401(l).

(b) Assume instead that Plan M provides that the annual overall permitted disparity limits must be satisfied without reducing the disparity provided for an employee under Plan M, thus requiring a reduction in the employee's annual disparity fraction under another plan. In that case, the disparity provided under Plan M would be uniform for the plan year and Plan M would continue to satisfy section 401(l). However, imputation of permitted disparity with respect to Employee B would not be allowed under Plan N.

(c) *Cumulative permitted disparity limit*—*(1) In general*—(i) *Employees who benefit under defined benefit plans.* In the case of an employee who has benefited under one or more defined benefit plans for a plan year beginning after December 31, 1991, the cumulative permitted disparity limit is satisfied if the employee's cumulative disparity fraction, as defined in paragraph (c)(2) of this section, does not exceed 35.

(ii) *Employees who do not benefit under defined benefit plans.* In the case of an employee who has not benefited under a defined benefit plan for any plan year beginning after December 31, 1991, the cumulative permitted disparity limit is satisfied.

(iii) *Certain plan years disregarded.* For purposes of this paragraph (c), an employee is not treated as benefiting under a defined benefit plan for a plan year beginning after December 31, 1991, if the employer can establish that for that plan year the defined benefit plan was not a section 401(*l*) plan and did not impute permitted disparity under § 1.401(a)(4)–7.

(iv) *Determination of type of plan.* For purposes of this paragraph (c), a target benefit plan that relies on the special rule of § 1.401(a)(4)–8(b)(3) to satisfy section 401(a)(4) and a DB/DC plan within the meaning of § 1.401(a)(4)–9(a) are treated as defined benefit plans. Similarly, a cash balance plan that relies on the special rule of § 1.401(a)(4)–8(c)(3) to satisfy section 401(a)(4) is treated as a defined contribution plan.

(2) *Cumulative disparity fraction.* An employee's cumulative disparity fraction is the sum of the employee's total annual disparity fractions, as defined in paragraph (b)(3) of this section, attributable to the employee's total years of service under all plans.

(3) *Determination of total annual disparity fractions for prior years*—(i) *Pre-effective date years.* For each of the employee's years of service under all plans as of the end of the last plan year beginning after January 1, 1989, the employee's total annual disparity fraction is one.

(ii) *Option for any prior year.* The total annual disparity fraction for each prior year of service (or for each prior year of service as of a single date specified in the plan) for each employee may be treated as one. Thus, for example, in lieu of calculating annual disparity fractions for all plan years, the employer may choose to assume that the full annual disparity limit has been used in each prior plan year, including years after 1988.

(4) *Examples.* The following examples illustrate this paragraph (c). In each example the plan is noncontributory and, unless provided otherwise, is the only plan ever maintained by the employer. Each plan uses a normal retirement age of 65 and contains no provision that would require a reduction in the 0.75-percent factor under paragraph (b)(2) or (b)(3) of this section. Each example discusses the benefit formula applicable to an employee who has a social security retirement age of 65.

Example 1. Plan M is a defined benefit excess plan that provides a normal retirement benefit of 1 percent of average annual compensation up to covered compensation, plus 1.75 percent of average annual compensation above covered compensation, for each year of service without limit. The disparity provided under the plan for the plan year is 0.75 percent, the excess benefit percentage of 1.75 percent minus the base benefit percentage of 1 percent. The maximum excess allowance for the plan year is 0.75 percent. Thus, each employee's annual defined benefit excess plan disparity fraction under the plan for each plan year is one. Because the plan contains no limit on the years of service taken into account under the plan, the sum of the total annual disparity fractions for a potential employee with more than 35 years of service will exceed 35. In addition, the plan does not provide that the overall permitted disparity limits may not be exceeded as required by paragraph (a)(2) of this section. The plan therefore does not satisfy the cumulative permitted disparity limit of this paragraph (c).

Example 2. Plan N is an offset plan that provides a normal retirement benefit of 2 percent of average annual compensation, minus 0.75 percent of final average compensation up to the lesser of covered compensation and average annual compensation, for each year of service up to 35. The disparity provided under the plan for the plan year is 0.75 percent, the offset percentage. The maximum offset allowance for the plan year is 0.75 percent. Thus, each employee's annual offset plan disparity fraction under the plan for each plan year is one. Because the plan limits the years of service taken into account under the plan to

35, the sum of the total annual disparity fractions for an employee cannot exceed 35. The plan therefore satisfies the cumulative permitted disparity limit of this paragraph (c).

Example 3. Plan O is a defined benefit excess plan that provides a normal retirement benefit of 0.75 percent of average annual compensation up to covered compensation, plus 1.25 percent of average annual compensation above covered compensation, for each year of service up to 45. The disparity provided under the plan for the plan year is 0.5 percent, the excess benefit percentage of 1.25 percent minus the base benefit percentage of 0.75 percent. The maximum excess allowance for the plan year is 0.75 percent. Thus, each employee's annual defined benefit excess plan disparity fraction under the plan for each plan year is 0.67 (0.5 percent divided by 0.75 percent). Because the plan limits the years of service taken into account under the plan to 45, the sum of the total annual disparity fractions for an employee cannot exceed 30 (0.67 x 45). The plan therefore satisfies the cumulative permitted disparity limit of this paragraph (c).

Example 4. (a) Plan P is a defined contribution excess plan. Plan P provides a base contribution percentage of 6 percent and an excess contribution percentage of 11.7 percent, thus providing disparity of 5.7 percent for the plan year. Because the maximum excess allowance for each plan year under Plan P is 5.7 percent, each employee's annual defined contribution excess plan disparity fraction under Plan P for each plan year is one. Plan Q is a defined benefit excess plan maintained by the same employer. Plan Q provides a base benefit percentage of 1 percent and an excess benefit percentage of 1.75 percent for each year of service up to 35, thus providing disparity of 0.75 percent for the plan year. Because the maximum excess allowance for each plan year under Plan Q is 0.75 percent, each employee's annual defined benefit excess plan disparity fraction under Plan Q for each plan year is one.

(b) Employee A benefits under Plan P for the 1980 through the 1994 plan years. The sum of Employee A's total annual disparity fractions under Plan P is 15. (Under paragraph (c)(3)(i) of this section, Employee A's annual disparity fraction for each year of service as of the end of the 1988 plan year is one.) As of the 1995 plan year, Employee A no longer benefits under Plan P and begins to benefit under Plan Q for the first time. In order to satisfy the cumulative permitted disparity limit of this paragraph (c), Plan Q must provide that no disparity will be provided if the sum of an employee's total annual disparity fractions reaches 35, taking into account the employee's annual defined contribution plan disparity fractions under Plan P as well as the employee's annual defined benefit excess plan disparity fractions under Plan Q. Thus, after Employee A has benefited under Plan Q for 20 years, Plan Q may not provide any disparity in additional benefits accrued for Employee A.

(d) *Additional rules.* The Commissioner may prescribe additional rules under this section as the Commissioner considers appropriate. Additional rules may include (without being limited to) rules for computing the fractions described in this section with respect to terminated plans, rules for applying the overall permitted disparity limits to employees who benefit under plans maintained by railroad employers, and rules for determining which plans do not satisfy section 401(l) if the overall permitted disparity limits are not exceeded.

§ 1.401(l)-6 Effective dates and transition rules.

(a) *In general.* Section 401(a)(5)(C) is effective for plan years beginning after December 31, 1988, and section 401(l) is effective with respect to plan years, and benefits attributable to plan years, beginning after December 31, 1988. The preceding sentence is applicable to a plan without regard to whether the plan was in existence as of a particular date.

(b) *Defined contribution plans.* A defined contribution plan satisfies section 401(l) with respect to a plan year beginning after December 31, 1988, if it satisfies the applicable requirements of §§ 1.401(l)-1 through 1.401(l)-5 for the plan year.

(c) *Defined benefit plans.* A defined benefit excess plan or offset plan satisfies section 401(l) with respect to all plan years, and benefits attributable to all plan years, beginning after December 31, 1988, by satisfying the applicable requirements of §§ 1.401(l)-1 through 1.401(l)-5 and the requirements § 1.401(a)(4)-13(c), using as the fresh-start date the last day of the last plan year beginning before January 1, 1989. A defined benefit excess plan or offset plan that does not satisfy section 401(l) with respect to all plan years, and benefits attributable to all plan years, beginning after December 31, 1988, may, under the rules of § 1.401(a)(4)-13(c), satisfy section 401(l) for plan years beginning after a fresh-start date by satisfying the applicable requirements of §§ 1.401(l)-1 through 1.401(l)-5 after the fresh-start date. See § 1.401(a)(4)-13 (c)(5)(iii) and (d), which allow increases in each employee's benefit accrued as of the fresh-start date to reflect increases in the employee's compensation if the plan uses a fresh-start date before the effective date applicable to the plan under § 1.401(a)(4)-13 (a) or (b).

(d) *Collectively bargained plans.* (1) In the case of a plan maintained pursuant to 1 or more collective bargaining agreements between employee representatives and 1 or more employers ratified before March 1, 1986, sections 401(a)(5) and 401(l) are applicable for plan years beginning on or after the later of—

(i) January 1, 1989, or

(ii) The date on which the last of such collective bargaining agreements terminates (determined without regard to any extension of any such agreement occurring on or after March 1, 1986). However, notwithstanding the preceding sentence, sections 401(a)(5) and 401(l) apply to plans described in this paragraph (d) no later than the first plan year beginning after January 1, 1991.

(2) For purposes of paragraph (d)(1)(ii) of this section, a change made after October 22, 1986, in the terms or conditions of a collectively bargained plan, pursuant to a collective bargaining agreement ratified before March 1, 1986, is not treated as a change in the terms and conditions of the plan.

(3) In the case of a collectively bargained plan described in paragraph (d)(1) of this section, if the date in paragraph (d)(1)(ii) of this section precedes November 15, 1988, then the date in this paragraph (d) is replaced with the date on which the last of any collective bargaining agreements in effect on November 15, 1988, terminates, provided that the plan complies during this period with a reasonable good faith interpretation of section 401(l).

(4) Whether a plan is maintained pursuant to a collective bargaining agreement is determined under the principles applied under section 1017(c) of the Employee Retirement Income Security Act of 1974. See H.R. Rep. No. 1280, 93d Cong., 2d Sess. 266 (1974). In addition, a plan is not treated as maintained under a collective bargaining agreement unless the employee representatives satisfy section 7701(a)(46) of the Internal Revenue Code after March 31, 1984. See § 301.7701-17T of this chapter for other requirements for a plan to be considered to be collectively bargained. In the case of a collectively bargained plan described in paragraph (d)(1) of this section, if the date in paragraph (d)(1)(ii) of this section precedes November 15, 1988, then the date in this paragraph (d) shall be replaced with the date on which the last of any collective bargaining agreements in effect on November 15, 1988, terminates, provided that the plan complies during this period with a reasonable good faith interpretation of section 401(l).

Fred T. Goldberg, Jr.,
Commissioner of Internal Revenue.

Approved: August 30, 1991.

Kenneth W. Gideon,
Assistant Secretary of the Treasury.

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26 CFR Part 1

[T.D. 8363]

RIN 1545-AK41

Minimum Coverage Requirements

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the minimum coverage requirements of section 410(b) of the Internal Revenue Code of 1986. They reflect changes made by the Tax Reform Act of 1986 and the Technical and Miscellaneous Revenue Act of 1988. These regulations provide guidance necessary to comply with the law and affect sponsors of, and participants in, tax-qualified retirement plans and certain other employee benefit plans.

EFFECTIVE DATE: These regulations are effective for plan years beginning on or after January 1, 1989, and applied to those plan years except as set forth in § 1.410(b)-10.

FOR FURTHER INFORMATION CONTACT: Rebecca Wilson at 202-377-9372 (not a toll-free number).

SUPPLEMENTARY INFORMATION: Proposed regulations under section 410(b) of the Internal Revenue Code (Code) were published in the **Federal Register** May 18, 1989 (54 FR 21437). The proposed regulations were supplemented and modified by proposed regulations published in the **Federal Register** on May 14, 1990 (55 FR 19897, 19931, and 55 FR 19947, 19958), September 14, 1990 (55 FR 37888, 37901), December 3, 1990 (55 FR 49906, 49908), and February 1, 1991 (56 FR 3988).

Written comments were received from the public on the proposed regulations. In addition, a public hearing on the proposed section 410(b) regulations was held November 20, 1989; a public hearing on the May 14, 1990, and September 14, 1990, proposed regulations was held September 26, 27, and 28, 1990; and a public hearing on the February 1, 1991, proposed regulations was held on May 16, 1991. After consideration of all the written comments received and the statements made at the public hearings, the proposed regulations under section 410(b) are adopted as modified by this Treasury Decision.

Explanation of Provisions:

Section 410(c) Minimum Coverage Requirement

1. The minimum coverage requirement

The proposed regulations provided that a plan could meet the section 410(b) minimum coverage requirement by satisfying either of two tests, the section 410(b)(1)(A) and (B) ratio percentage test or the section 410(b)(2) average benefit test. These provisions are retained in the final regulations. To satisfy the ratio percentage test for a plan year, a plan must have a ratio percentage of at least 70 percent. A plan's ratio percentage is the percentage of the employer's nonhighly compensated employees who benefit under the plan divided by the percentage of the employer's highly compensated employees who benefit under the plan.

To satisfy the average benefit test, two requirements must be met—the nondiscriminatory classification test of section 410(b)(2)(A)(i) and the average benefit percentage test of section 410(b)(2)(A)(ii). The nondiscriminatory classification test requires a plan to benefit employees who qualify under a reasonable employer-determined classification that does not discriminate in favor of highly compensated employees. The average benefit percentage test requires that the average benefit percentage for nonhighly compensated employees be at least 70 percent of the average benefit percentage for highly compensated employees. Both of these requirements are discussed in greater detail below.

2. Plans automatically meeting the minimum coverage requirement

The final regulations retain provisions under which certain plans automatically satisfy the minimum coverage requirement. These include plans that benefit only nonhighly compensated employees, plans maintained by employers that have only highly compensated employees, and collectively bargained plans or portions of plans (including governmental plans described in section 414(d)). The proposed regulations also provided that a plan with no accruals for a plan year automatically satisfied section 410(b). This remains true but the provision has been deleted in the final regulations because any plan that automatically satisfies section 410(b) under this rule also satisfies section 410(b) automatically because it is a plan that benefits no highly compensated employees for a plan year.

3. Benefiting Under a Plan

As provided in the proposed regulations, the final regulations provide that an employee benefits under a plan for a plan year only if the employee receives an allocation or an accrual for that plan year. Thus, for example, an employee who has an accrued benefit under a defined benefit plan but does not receive an accrual for the plan year because the employee worked less than the 1,000 hour minimum service requirement under the plan in that year is not benefiting under the plan for the plan year. Or, for example, an employee who is a participant in a defined contribution plan but does not receive an allocation because the employee is not employed by the employer on the last day of the plan year is not benefiting under the plan for the plan year. To the extent that Rev. Rul. 76-250, 1976-2 C.B. 124, and Rev. Rul. 81-210, 1981-2 C.B. 89, conflict with this general rule, they are superseded.

The final regulations also retain the special rule for section 401(k) and section 401(m) plans. Thus, an employee benefits under these plans for purposes of section 410(b) if the employee is eligible to make elective contributions (in the case of the section 401(k) feature) or to make after-tax employee contributions or to receive matching contributions (in the case of the section 401(m) feature), regardless of whether the employee actually elects to participate.

The final regulations retain and clarify the general rule that a former employee benefits under a plan for a plan year only if the plan provides additional benefit accruals for the former employee for that plan year. Thus, for example, a former employee is benefiting under a plan for a plan year if the plan is amended to provide an ad hoc cost-of-living increase in the former employee's benefits, and the amendment is first effective in the plan year.

4. Nondiscriminatory Classification Test

The section 410(b)(2)(A)(i) nondiscriminatory classification test requires a plan to benefit a group of employees that constitutes an employer-determined classification that is both reasonable and nondiscriminatory. The final regulations, like the proposed regulations, require that, in order to be a reasonable classification, the classification must be based on objective business criteria that identify the category of employees who benefit under the plan.

The final regulations, like the proposed regulations, provide that the nondiscrimination requirement under the nondiscriminatory classification test may be met by satisfying either a safe harbor or a facts-and-circumstances test. While the safe harbor in the final regulations is unchanged, the presentation of the requirements has been revised to improve clarity. As revised, the first step in determining

whether the safe harbor is satisfied is to determine the plan's ratio percentage in the same manner as the ratio percentage calculation described above in the discussion of the ratio percentage test. Under an incremental scale set forth in a chart in the regulations, a plan satisfies the safe harbor if the ratio percentage of the plan is 50 percent (or, as the concentration of nonhighly compensated employees in the employer's workforce increases, a lesser percentage). For example, if 64 percent of an employer's employees are nonhighly compensated employees, the safe harbor ratio percentage for the employer's plans is 47 percent. If 96 percent of an employer's employees are nonhighly compensated employees, the safe harbor ratio percentage for the employer's plans is 23 percent.

The regulations also provide an incremental scale un-safe harbor beginning at a ratio percentage of 40 percent and decreasing to 20 percent as the concentration of nonhighly compensated employees in the employer's workforce increases. Thus, any plan with a ratio percentage below 20 percent necessarily falls within an unsafe harbor and does not satisfy the minimum coverage requirement of section 410(b).

As in the proposed regulations, the final regulations provide that a plan with a ratio percentage between the safe harbor and the unsafe harbor ratio percentages may satisfy the nondiscrimination requirement of the nondiscriminatory classification test on the basis of facts and circumstances. Relevant facts and circumstances include the underlying business reason for the classification, the percentage of employees benefiting under the plan, whether the number of employees benefiting under the plan in each salary range is representative of the total in that range, how close the plan's ratio percentage is to the employer's safe harbor percentage, and the extent to which the plan's average benefit percentage exceeds 70 percent. The list of relevant facts and circumstances was revised in the final regulations to add the average benefit percentage factor. The revised list continues to provide only examples and is not intended to be exhaustive of all potentially relevant facts and circumstances for purposes of this nondiscrimination determination.

5. Average Benefit Percentage Test

As in the proposed regulations, satisfaction of the average benefit percentage test requires that the employer determine an employee benefit percentage for each employee taken into account for testing purposes and then separately average the percentages of all employees in the highly compensated and nonhighly compensated groups. In general, the test is satisfied if the benefits provided to nonhighly compensated employees under all plans of the employer (expressed as a percentage of compensation) are at least 70 percent as great, on average, as the benefit provided to the employer's highly compensated employees (expressed as a percentage of compensation).

The proposed regulations permitted benefit percentages to be determined on either a contribution or a benefit basis, using the approach provided under the proposed section 401(a)(4) regulations to determine accrual and allocation rates under aggregated plans. The final regulations generally continue this approach, but revise it to reflect changes made in the testing methods provided in the final regulations under section 401(a)(4) that are being issued simultaneously with these final regulations. In addition, in response to comments, a new method is provided for determining employee benefit percentages that allows an employee's employee benefit percentage to be calculated as the sum of the employee's allocation and accrual rates (as determined for purposes of section 401(a)(4)) under all plans in which the employee participates, provided the rates are determined on a consistent basis. This optional simplified method will in many cases permit employers to use the rates they have already calculated for purposes of section 401(a)(4) for purposes of the average benefit percentage test as well.

While, in general, all plans of the employer must be aggregated into a single testing group for purposes of the average benefits percentage test, this rule does not apply to aggregate collectively bargained plans with noncollectively bargained plans; to aggregate plans of different lines of business where the employer is treated as operating separate lines of business under section 414(r); or to aggregate plans maintained by different employers. In response to comments, however, and in the limited context of the average benefit percentage test, a special rule has been added to the final regulations to permit benefits provided to collectively bargained employees and noncollectively bargained employees to be considered together where the benefits are provided under a single plan covering both collectively bargained and noncollectively bargained employees. The special rule is only available to such a plan if the plan as a whole satisfies the ratio percentage test, and both groups of employees are covered under the same benefit formula. Under this special rule, a plan meeting these requirements is deemed to satisfy the average benefit percentage test. The special rule is applicable only to the average benefit percentage test prong of the average benefit test in § 1.410(b)–2(b)(3). Therefore, both groups must still separately satisfy the nondiscriminatory classification test of § 1.410(b)–4.

6. Retroactive Correction Mechanism

In response to comments, these final regulations, like the final regulations under section 401(a)(4) being issued simultaneously with these regulations, permit retroactive correction within a period extending through the fifteenth day of the tenth month after the end of the plan year. This approach, which is similar to that contained in section 401(b) with respect to certain disqualifying provisions, provides the employer with a significant period within which to run any necessary tests and take corrective action.

In order to permit employers to make practical choices based on administrative concerns, use of the retroactive correction period is not conditioned on a demonstration that the plan actually failed to satisfy the nondiscrimination requirements, including the minimum coverage requirements. In addition, the correction is not limited to amendments correcting disqualifying defects. The final regulations do require, however, that any retroactive amendment be nondiscriminatory standing alone and be consistent with the anti-cutback rules of section 411(d)(6).

7. Excludable Employees

Generally, in applying the minimum coverage requirements, all employees of the employer are taken into account. However, the final regulations, like the proposed regulations, provide that the following employees are excluded from consideration: employees who do not meet the plan's minimum age and service conditions, employees covered by a collective bargaining agreement (when testing the noncollectively bargained portion of the plan), employees of other qualified separate lines of business (when testing a plan of a given qualified separate line of business), and terminated employees with not more than 500 hours of service.

The final regulations revise the employee exclusion rules in five additional respects. First, the exclusion for terminated employees with not more than 500 hours of services, which was

mandatory in the proposed regulations, is permissive in the final regulations and is further modified to make the rule available to plans using the elapsed time method of determining years of service.

Second, in response to comments, the final regulations provide special rules to accommodate situations in which employees move into and out of collectively bargained status within a limited period of time while continuing to receive benefits pursuant to a collective bargaining agreement. Under these rules, the employer may, in certain situations, temporarily continue to treat these individuals as collectively bargained employees for purposes of satisfying section 410(b).

Third, because section 401(k)(4)(B) generally precludes state and local governments and tax-exempt organizations from maintaining section 401(k) plans for their employees, commentators requested that employees of these entities be excludable where the other employees of the controlled group are eligible to participate in a section 401(k) plan. Thus, an exclusion was added to the final regulations for employees of governmental or tax-exempt entities if those employees are precluded statutorily from benefiting under a section 401(k) plan and if more than 95 percent of the employees who are not precluded statutorily from participating in the section 401(k) plan benefit under the section 401(k) plan for the plan year.

Fourth, in response to comments, the final regulations clarify that an employee is treated as meeting a plan's age and service requirements on the date any employee with the same age and service would be eligible to commence participation in the plan. This conforms to the provision of section 410(b)(4)(C).

Finally, employees who are nonresident aliens and who receive no U.S. source earned income are excluded even if they are benefiting under the plan. The exclusion of nonresident aliens who receive no U.S. source income is required by section 410(b)(3)(C) and was included in the proposed regulations. A rule has been added to the final regulations permitting an employer to exclude nonresident aliens who receive U.S. source income if that income is exempt from U.S. income tax under an applicable income tax convention and if the employer excludes all employees in this category.

8. Definition of Plan and Rules of Disaggregation and Aggregation

In general, under the proposed regulations, each single plan (determined under the rules of section 414(l)) is a separate plan for purposes of section 410(b). In addition, the proposed regulations required certain single plans under section 414(l) to be disaggregated into two or most separate plans, each of which must satisfy section 410(b). These rules apply, for example, to separate the collectively bargained portion of a plan from the non-bargained portion, the employee stock ownership plan (ESOP) portion from the non-ESOP portion, and the qualified cash or deferred arrangement under section 401(k) (CODA) from the non-CODA portion. Several commentators requested exceptions from mandatory disaggregation of collectively bargained and noncollectively bargained portions of plans. In general, the final regulations retain the mandatory disaggregation rules, as they are consistent with the mandatory testing exclusions applicable to collectively bargained and noncollectively bargained employees in section 410(b). A limited exception in the context of the average benefit percentage test is provided in the final regulations and discussed in the context of that test above. Some commentators also requested guidance on the treatment of the defined contribution portion of a defined benefit plan that provides benefits described in section 414(k) based on separate accounts. The final regulations clarify that the defined benefit and defined contribution portions of such a plan are treated as separate plans.

The final regulations continue to provide permissive aggregation rules under which two or more plans that are not mandatorily disaggregated may be treated as a single plan for purposes of the ratio percentage and nondiscriminatory classification tests. The final regulations also continue to provide rules for determining the testing group of plans taken into account in determining whether a plan satisfies the average benefit percentage test. The final regulations clarify, however, that, except in certain limited circumstances such as the determination of excludable employees, the plans in the testing group are not actually treated as a single plan.

9. Other Rules

a. *Former employees.* The final regulations, like the proposed regulations, require that a plan satisfy the minimum coverage requirements separately for employees and former employees for each plan year. If no former employee receives an additional benefit accrual for a plan year, the plan automatically satisfies section 410(b) with respect to former employees. The proposed regulations included a special rule under which a defined benefit plan satisfied section 410(b) with respect to former employees for a plan year if (i) it benefits at least five former employees and (ii) 60 percent of benefiting former employees are nonhighly compensated employees. The final regulations retain this special rule, but add an alternative under which the second prong of the test is satisfied if 95 percent of all former employees with accrued benefits under the benefit under the plan.

b. *Plans maintained by more than one employer.* Multiple employer plans must satisfy section 410(b) on an employer-by-employer basis rather than on the basis of participating employers in the aggregate. Any noncollectively bargained portion of a multiemployer plan is tested as a multiple employer plan. Failure to satisfy section 410(b) with respect to any component of this testing process may result in disqualification of the plan for all participating employers. The final regulations, like the proposed regulations, do not provide an exception to this rule. However, where a multiemployer plan or a multiple employer plan fails to satisfy section 410(b), in a proper case, the Commissioner could retain the plan's qualified status for innocent employers by requiring corrective and remedial action with respect to the plan, such as allowing the withdrawal of an offending employer, allowing a disqualifying defect to be cured within a reasonable period of time after the plan administrator has or should have knowledge of the disqualifying event or was otherwise notified by the Service of the disqualifying defects, or requiring plan amendments to prevent future disqualifying events.

c. *Special rules for governmental plans, church plans, and tax-sheltered annuities.* In general, except for certain plans that provide section 403(b) tax-sheltered annuities, governmental plans and church plans must satisfy section 401(a)(3), as in effect prior to the enactment of the Employee Retirement Income Security Act of 1974 (ERISA), in lieu of satisfying section 410(b). The final regulations clarify, however, that, for purposes of this requirement, a plan that satisfies section 410(b) will be treated as satisfying pre-ERISA section 401(a)(3).

Governmental plans and church plans that provide nonelective contributions under section 403(b) must, pursuant to section 403(b)(12), satisfy section 410(b). Because section 410(c) does not apply to such plans, satisfaction of pre-ERISA section 401(a)(3) will not satisfy section 403(b)(12). Of course, such plans may continue to rely on the safe harbors

published in Notice 89–23, 1989–1 C.B. 654, until further guidance is issued.

Under the proposed regulations, section 410(b) was considered to be satisfied in the case of governmental plans for plan years beginning before 1993. This provision is retained in the final regulations. In addition, the final regulations provide that, if the governing body with authority to amend the plan does not meet continuously, section 410(b) will be considered satisfied for plan years beginning before 90 days after the opening of the first legislative session beginning after December 31, 1992.

The Treasury and the Service recognize that governmental plans may have some unique features that arise because the sponsoring employer is a governmental entity. Comments are specifically requested from governmental employers regarding the appropriate modifications to the regulations to take into account the operation of governmental plans.

d. *Special rule for certain dispositions or acquisitions.* Section 410(b)(6)(C) and the proposed regulations provide a transition rule for certain dispositions or acquisitions, under which a plan is treated as satisfying section 410(b) for a limited period. In response to comments, the final regulations clarify that this rule applies to asset as well as stock transactions as long as the transaction involves a change in employer of the employees of a trade or business. See § 1.410(b)–2(f).

e. *Definition of employee.* In response to comments, a provision has been added to clarify that an individual is treated as an employee rather than a former employee if the plan credits the individual with imputed compensation or service during a period in which the individual is not performing services.

f. *Annual testing option.* Under the proposed regulations, a plan was generally required to satisfy section 410(b) on every day of the plan year. Under certain conditions, a plan could, however, be deemed to satisfy section 410(b) for a plan year if it satisfied section 410(b) on a selected day in each quarter. The final regulations retain and clarify these minimum coverage testing rules in the proposed regulations. In addition, the final regulations add an annual testing option. Under this new testing option, a plan will satisfy section 410(b) for a plan year if it satisfies § 1.410(b)–2 as of the last day of the plan year. If this option is used, the employer must take into account all employees (or former employees) who were employees (or former employees) on any day during the plan year. This new annual method is required to be used in testing plans subject to section 401(k) or section 401(m), and for purposes of the average benefit percentage test.

g. *Other modifications.* The final regulations have also been clarified in certain respects and modified in conjunction with the final section 401(a)(4) regulations. For example, the definitions of compensation used are generally the same as those applicable under section 401(a)(4). As another example, a rule has been added to the final regulations to provide that all percentages are calculated to the nearest hundredth of a percentage point and all other numbers are calculated to the nearest hundredth.

Special Analyses

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations and, therefore, a final Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Code, the notice of proposed rulemaking for the regulations was submitted to the Administrator of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal authors of these regulations are Rebecca Wilson and Nancy J. Marks, Office of the Assistant Chief Counsel (Employee Benefits and Exempt Organizations), Internal Revenue Service. However, personnel from other offices of the Service and Treasury Department participated in their development.

List of Subjects in 26 CFR 1.401–0 through 1.419A–2T

Bonds, Employee benefit plans, Income taxes, Pensions, Reporting and recordkeeping requirements, Securities, Trusts and trustees.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority for part 1 is amended by adding the following citation:

Authority: Sec. 7805, 68A Stat. 917; 26 U.S.C. 7805 * * * §§ 1.410(b)–2 through 1.410(b)–10 also issued under 26 U.S.C. 410(b)(6). * * *

Par. 2. New § 1.410(b)–0 is added to read as follows:

§ 1.410(b)–0 Table of Contents.

This section contains a listing of the headings of §§ 1.410(b)–1 through 1.410(b)–10.

§ 1.410(b)-4 Nondiscriminatory classification test.

§ 1.410(b)-5 Average benefit percentage test.

§ 1.410(b)-6 Excludable employees.

§ 1.410(b)-7 Definition of plan and rules governing plan disaggregation and aggregation.

§ 1.410(b)-8 Additional rules.

§ 1.410(b)-9 Definitions.

§ 1.410(b)-10 Effective dates and transition rules.

(2) Example.

(3) Plan maintained pursuant to a collective bargaining agreement.

Par. 3. Section 1.410(b)–1 is amended by revising the heading and paragraph (a) to read as follows:

§ 1.410(b)–1 Minimum coverage requirements (before 1989).

(a) *In general.* A plan is not a qualified plan (and a trust forming a part of the plan is not a qualified trust) unless the plan satisfies section 410(b)(1). For plan years prior to the applicable effective date set forth in § 1.410(b)–10, a plan satisfies section 410(b)(1) if it satisfies the requirements of paragraph (b)(1) or (b)(2) of this section. See also § 1.410(b)–2 for plan years beginning on or after the applicable effective date set forth in § 1.410(b)–10.

* * * * *

Par. 4. New §§ 1.410(b)–2 through 1.410(b)–10 are added to read as follows:

§ 1.410(b)–2 Minimum coverage requirements (after 1988).

(a) *In general.* A plan is a qualified plan for a plan year only if the plan satisfies section 410(b) for the plan year. A plan satisfies section 410(b) for a plan year if and only if it satisfies paragraph (b) of this section with respect to employees for the plan year and paragraph (c) of this section with respect to former employees for the plan year. The rules in paragraphs (a), (b), and (c) of this section apply to all plans as a condition of qualification, including plans under which no employee is able to accrue any additional benefits (for example, frozen plans). Paragraphs (d), (e), and (f) of this section provide special rules for nonelective section 403(b) plans subject to section 403(b)(12)(A)(i), for governmental and church plans subject to section 410(c), and for certain acquisitions or dispositions, respectively. See § 1.410(b)–7 for rules for determining the "plan" subject to section 410(b).

(b) *Requirements with respect to employees*—(1) *In general.* A plan satisfies this paragraph (b) for a plan year if and only if it satisfies at least one of the tests in paragraphs (b)(2) through (b)(7) of this section for the plan year.

(2) *Ratio percentage test*—(i) *In general.* A plan satisfies this paragraph (b)(2) for a plan year if and only if the plan's ratio percentage for the plan year is at least 70 percent. This test incorporates both the percentage test of section 410(b)(1)(A) and the ratio test of section 410(b)(1)(B). See § 1.410(b)–9 for the definition of ratio percentage.

(ii) *Examples.* The following examples illustrate the ratio percentage test of this paragraph (b)(2).

Example 1. For a plan year, Plan A benefits 70 percent of the employer's nonhighly compensated employees and 100 percent of an employer's highly compensated employees. The plan's ratio percentage for the year is 70 percent (70 percent/100 percent), and thus the plan satisfies the ratio percentage test.

Example 2. For a plan year, Plan B benefits 40 percent of the employer's nonhighly compensated employees and 60 percent of the employer's highly compensated employees. Plan B fails to satisfy the ratio percentage test because the plan's ratio percentage is only 66.67 percent (40 percent/60 percent).

(3) *Average benefit test.* A plan satisfies this paragraph (b)(3) for a plan year if and only if the plan satisfies both the nondiscriminatory classification test of § 1.410(b)–4 and the average benefit percentage test of § 1.410(b)–5 for the plan year.

(4) *Certain tax credit employee stock ownership plans.* A plan satisfies this paragraph (b)(4) for a plan year if and only if the plan—

(i) Is a tax credit employee stock ownership plan (as defined in section 409(a)),

(ii) Is the only plan of the employer that is intended to qualify under section 401(a), and

(iii) Is a plan that satisfies the rule set forth in section 410(b)(6)(D).

This paragraph (b)(4) is available only for plan years for which the tax credit employee stock ownership plan receives contributions for which the employer is allowed a tax credit under section 41 (as in effect prior to its repeal by the Tax Reform Act of 1986) or section 48(n) (as in effect prior to its amendment by the Tax Reform Act of 1984). The requirement of this paragraph (b)(4) that the plan be the only plan of the employer that is intended to qualify under section 401(a) is not satisfied if the employer has only one plan, but that plan is treated as two or more separate plans under the mandatory disaggregation rules of § 1.410(b)–7(c).

(5) *Employers with no nonhighly compensated employees.* A plan satisfies this paragraph (b)(5) for a plan year if the plan is maintained by an employer that has no nonhighly compensated employees at any time during the plan year.

(6) *Plans benefiting no highly compensated employees.* A plan satisfies this paragraph (b)(6) for a plan year if the plan benefits no highly compensated employees for the plan year.

(7) *Plans benefiting collectively bargained employees.* A plan that benefits solely collectively bargained employees for a plan year satisfies this paragraph (b)(7) for the plan year. If a plan (within the meaning of § 1.410(b)–7(b)) benefits both collectively bargained employees and noncollectively bargained employees for a plan year, § 1.410(b)–7(c)(5) provides that the portion of the plan that benefits collectively bargained employees is treated as a separate plan from the portion of the plan that benefits noncollectively bargained employees. Thus, the mandatorily disaggregated portion of the plan that benefits the collectively bargained employees automatically satisfies this paragraph (b)(7) for the plan year and hence section 410(b). See § 1.410(b)–9 for the definitions of collectively bargained employee and noncollectively bargained employee, respectively.

(c) *Requirements with respect to former employees*—(1) *Former employees tested separately.* Former employees are tested separately from employees for purposes of section 410(b). Thus, former employees are disregarded in applying the ratio percentage test, the nondiscriminatory classification test, and the average benefit percentage test with respect to the coverage of employees under a plan, and employees are disregarded in applying this section with respect to the coverage of former employees under a plan.

(2) *Testing former employees*—(i) *In general.* A plan satisfies section 410(b) with respect to former employees if it satisfies one of the tests in paragraphs (b)(2) through (b)(7) of this section with respect to former employees. For this purpose, these tests are applied by substituting "former employee" for "employee," "nonhighly compensated former employee" for "nonhighly compensated employee," and "highly compensated former employee" for "highly compensated employee," whenever those terms are used.

(ii) *Special rule.* A defined benefit plan satisfies section 410(b) with respect to former employees for a plan year if the plan benefits at least five former employees, and if either—

(A) More than 95 percent of all former employees with accrued benefits under the plan benefit under the plan for the plan year, or

(B) At least 60 percent of the former employees who benefit under the plan for the plan year are nonhighly compensated former employees.

(d) *Nonelective contributions under section 403(b) plans.* For plan years beginning on or after January 1, 1993, a plan subject to section 403(b)(12)(A)(i) with respect to nonelective contributions (i.e., contributions not made pursuant to a salary reduction

agreement) is treated as a plan subject to the requirements of this section. For this purpose, a plan described in the preceding sentence must satisfy the requirements of this section without regard to section 410(c) and paragraph (e) of this section. For plan years beginning before January 1, 1993, any plan described in section 410(c)(1)(A) (regarding governmental plans) satisfies the requirements of this section.

(e) *Certain governmental and church plans.* The requirements of section 410(b) do not apply to a plan described in section 410(c)(1) (other than a plan subject to section 403(b)(12)(A)(i) or a plan with respect to which an election has been made under section 410(d)). Such a plan must satisfy section 401(a)(3) as in effect on September 1, 1974. For this purpose, a plan that satisfies section 410(b) (without regard to this paragraph (e)) is treated as satisfying section 401(a)(3) as in effect on September 1, 1974. For plan years beginning before January 1, 1993, any plan described in section 410(c)(1)(A) (regarding governmental plans) satisfies section 401(a)(3) as in effect on September 1, 1974.

(f) *Certain acquisitions or dispositions.* Section 410(b)(6)(C) (relating to certain acquisitions or dispositions) provides a special rule whereby a plan may be treated as satisfying section 410(b) for a limited period of time after an acquisition or disposition. Section 410(b)(6)(C) does not apply to acquisitions or dispositions that occurred prior to the first plan year to which section 410(b), as amended by the Tax Reform Act of 1986, applies. For purposes of section 410(b)(6)(C) and this paragraph (f), the terms "acquisition" and "disposition" refer to an asset or stock acquisition, merger, or other similar transaction involving a change in employer of the employees of a trade or business.

(g) *Additional rules.* The Commissioner may, in revenue rulings, notices, and other guidance of general applicability, provide any additional rules that may be necessary or appropriate in applying the minimum coverage requirements of section 410(b), including (without limitation) additional rules limiting or expanding the methods in § 1.410(b)–5(d) and (e) for determining employee benefit percentages.

§ 1.410(b)–3 Employees and former employees who benefit under a plan.

(a) *Employees benefiting under a plan*—(1) *In general.* Except as provided in paragraph (a)(2) of this section, an employee is treated as benefiting under a plan for a plan year if and only if for that plan year, in the case of a defined contribution plan, the employee receives an allocation taken into account under § 1.401(a)(4)–2(c)(2)(ii), or in the case of a defined benefit plan, the employee receives an increase in the dollar amount of a benefit accrued or treated as an accrued benefit under section 411(d)(6).

(2) *Exceptions to allocation or accrual requirement*—(i) *Section 401(k) and 401(m) plans.* Notwithstanding paragraph (a)(1) of this section, an employee is treated as benefiting under a section 401(k) plan for a plan year if and only if the employee is an eligible employee under the plan as defined in § 1.401(k)–1(g)(4) for the plan year. Similarly, an employee is treated as benefiting under a section 401(m) plan for a plan year if and only if the employee is an eligible employee as defined in § 1.401(m)–1(f)(4) for the plan year.

(ii) *Section 415 limits.* In determining whether an employee is treated as benefiting under a plan for a plan year, plan provisions that implement the limits of section 415 are disregarded. Any plan provision that provides for increases in an employee's accrued benefit (which would have been greater but for the application of section 415(b)) due solely to adjustments under section 415(d)(1) is also disregarded, but only if such provision applies uniformly to all employees in the plan.

(iii) *Certain plan limits.* An employee is treated as benefiting under a plan for a plan year if the employee satisfies all of the applicable conditions for accruing a benefit for the plan year but fails to accrue the benefit solely because of a benefit limit under the plan that is uniformly applicable to all employees in the plan. Thus, for example, if a defined benefit plan takes into account only the first 30 years of service for accrual purposes, a participant who has completed more than 30 years of service is still treated as benefiting under the plan.

(iv) *Benefit offset arrangements.* An employee is treated as benefiting under a plan for a plan year even if the employee's current benefit accrual under the plan is offset by the contributions or benefits provided on behalf of the employee under another qualified plan, if the employee has satisfied all other conditions for a current benefit accrual under the plan. If the other plan is maintained by another employer, the employee whose benefits are subject to the offset must have become an employee of the employer maintaining the plan pursuant to a transaction described in § 1.410(b)–2(f) (regarding certain acquisitions and dispositions) between the two employers.

(v) *Post-normal retirement age adjustments.* An employee is treated as benefiting under a defined benefit plan for a plan year if the employee has attained normal retirement age and fails to accrue a benefit solely because of the provisions of section 411(b)(1)(H)(iii) regarding adjustments for delayed retirement.

(3) *Examples.* The following examples illustrate the determination of whether an employee is benefiting under a plan for purposes of section 410(b).

Example 1. An employer has 35 employees who are eligible under a defined benefit plan. The plan requires 1,000 hours of service to accrue a benefit. Only 30 employees satisfy the 1,000-hour requirement and accrue a benefit. The five employees who do not satisfy the 1,000-hour requirement during the plan year are taken into account in testing the plan under section 410(b) but are treated as not benefiting under the plan.

Example 2. An employer maintains a section 401(k) plan. Only employees who are at least 21 and who complete one year of service are eligible employees under the plan within the meaning of § 1.401(k)–1(g)(4). Under the rule of paragraph (a)(2)(i) of this section, only employees who have satisfied these age and service conditions are treated as benefiting under the plan.

Example 3. The facts are the same as in *Example 2,* except that the employer also maintains a section 401(m) plan that provides matching contributions contingent on elective contributions under the section 401(k) plan. The matching contributions are contingent on employment on the last day of the plan year. Under § 1.401(m)–1(f)(4), because matching contributions are contingent on employment on the last day of the plan year, not all employees who are eligible employees under the section 401(k) plan are eligible employees under the section 401(m) plan. Thus, employees who have satisfied the age and service conditions but who do not receive a matching contribution because they are not employed on the last day of the plan year are treated as not benefiting under the section 401(m) portion of the plan.

(b) *Former employees benefiting under a plan*—(1) *In general.* A former employee is treated as benefiting for a plan year if and only if the plan provides an allocation or benefit increase described in paragraph (a)(1) of this section to the former employee for the plan year. Thus, for example, a former employee benefits under a defined benefit plan for a plan year if the plan is amended to provide an ad hoc cost-of-living adjustment in the former employee's benefits. In contrast, because an increase in benefits payable under a plan pursuant to an automatic cost-of-living provision adopted and effective before the beginning of the plan year is previously accrued, a

former employee is not treated as benefiting in a subsequent plan year merely because the former employee receives an increase pursuant to such an automatic cost-of-living provision. Any accrual or allocation for an individual during the plan year that arises from the individual's status as an employee is treated as an accrual or allocation of an employee. Similarly, any accrual or allocation for an individual during the plan year that arises from the individual's status as a former employee is treated as an accrual or allocation of a former employee. It is possible for an individual to accrue a benefit both as an employee and as a former employee in a given plan year. During the plan year in which an individual ceases performing services for the employer, the individual is treated as an employee in applying section 410(b) with respect to employees and is treated as a former employee in applying section 410(b) with respect to former employees.

(2) *Examples.* The following examples illustrate the determination of whether a former employee benefits under a plan for purposes of section 410(b).

Example 1. Employer A amends its defined benefit plan in the 1995 plan year to provide an ad hoc cost-of-living increase of 5 percent for all retirees. Former employees who receive this increase are treated as benefiting under the plan for the 1995 plan year.

Example 2. Employer B maintains a defined benefit plan with a calendar plan year. In the 1995 plan year, Employer B amends the plan to provide that an employee who has reached early retirement age under the plan and who retires before July 31 of the 1995 plan year will receive an unreduced benefit, even though the employee has not yet reached normal retirement age. This early retirement window benefit is provided to employees based on their status as employees. Thus, although individuals who take advantage of the benefit become former employees, the window benefit is treated as provided to employees and is not treated as a benefit for former employees.

Example 3. The facts are the same as *Example 2,* except that on September 1, 1995, Employer B also amends the defined benefit plan to provide an ad hoc cost-of-living increase effective for all former employees. An individual who ceases performing services for the employer before July 31, 1995, under the early retirement window, and then receives the ad hoc cost-of-living increase, is treated as benefiting for the 1995 plan year both as an employee with respect to the early retirement window, and as a former employee with respect to the ad hoc COLA.

§ 1.410(b)-4 Nondiscriminatory classification test.

(a) *In general.* A plan satisfies the nondiscriminatory classification test of this section for a plan year if and only if, for the plan year, the plan benefits the employees who qualify under a classification established by the employer in accordance with paragraph (b) of this section, and the classification of employees is nondiscriminatory under paragraph (c) of this section.

(b) *Reasonable classification established by the employer.* A classification is established by the employer in accordance with this paragraph (b) if and only if, based on all the facts and circumstances, the classification is reasonable and is established under objective business criteria that identify the category of employees who benefit under the plan. Reasonable classifications generally include specified job categories, nature of compensation (i.e., salaried or hourly), geographic location, and similar bona fide business criteria. An enumeration of employees by name or other specific criteria substantially the same effect as an enumeration by name is not considered a reasonable classification.

(c) *Nondiscriminatory classification*—(1) *General rule.* A classification is nondiscriminatory under this paragraph (c) for a plan year if and only if the group of employees included in the classification benefiting under the plan satisfies the requirements of either paragraph (c)(2) or (c)(3) of this section for the plan year.

(2) *Safe harbor.* A plan satisfies the requirement of this paragraph (c)(2) for a plan year if and only if the plan's ratio percentage is greater than or equal to the employer's safe harbor percentage, as defined in paragraph (c)(4)(i) of this section. See § 1.410(b)-9 for the definition of a plan's ratio percentage.

(3) *Facts and circumstances*—(i) *General rule.* A plan satisfies the requirements of this paragraph (c)(3) if and only if—

(A) The plan's ratio percentage is greater than or equal to the unsafe harbor percentage, as defined in paragraph (c)(4)(ii) of this section, and

(B) The classification satisfies the factual determination of paragraph (c)(3)(ii) of this section.

(ii) *Factual determination.* A classification satisfies this paragraph (c)(3)(ii) if and only if, based on all the relevant facts and circumstances, the Commissioner finds that the classification is nondiscriminatory. No one particular fact is determinative. Included among the facts and circumstances relevant in determining whether a classification is nondiscriminatory are the following—

(A) The underlying business reason for the classification. The greater the business reason for the classification, the more likely the classification is to be nondiscriminatory. Reducing the employer's cost of providing retirement benefits is not a relevant business reason.

(B) The percentage of the employer's employees benefiting under the plan. The higher the percentage, the more likely the classification is to be nondiscriminatory.

(C) Whether the number of employees benefiting under the plan in each salary range is representative of the number of employees in each salary range of the employer's workforce. In general, the more representative the percentages of employees benefiting under the plan in each salary range, the more likely the classification is to be nondiscriminatory.

(D) The difference between the plan's ratio percentage and the employer's safe harbor percentage. The smaller the difference, the more likely the classification is to be nondiscriminatory.

(E) The extent to which the plan's average benefit percentage (determined under § 1.410(b)-5) exceeds 70 percent.

(4) *Definitions*—(i) *Safe harbor percentage.* The safe harbor percentage of an employer is 50 percent, reduced by ¾ of a percentage point for each whole percentage point by which the nonhighly compensated employee concentration percentage exceeds 60 percent. See paragraph (c)(4)(iv) for a table that illustrates the safe harbor percentage and unsafe harbor percentage.

(ii) *Unsafe harbor percentage.* The unsafe harbor percentage of an employer is 40 percent, reduced by ¾ of a percentage point for each whole percentage point by which the nonhighly compensated employee concentration percentage exceeds 60 percent. However, in no case is the unsafe harbor percentage less than 20 percent.

(iii) *Nonhighly compensated employee concentration percentage.* The nonhighly compensated employee concentration percentage of an employer is the percentage of all the employees of the employer who are nonhighly compensated employees. Employees who are excludable employees for purposes of the average benefit are not taken into account.

(iv) *Table.* The following table sets forth the safe harbor and unsafe harbor percentages at each nonhighly compensated employee concentration percentage:

Nonhighly compensated employee concentration percentage	Safe harbor percentage	Unsafe harbor percentage
0–60	50.00	40.00
61	49.25	39.25
62	48.50	38.50
63	47.75	37.75

Nonhighly compensated employee concentration percentage	Safe harbor percentage	Unsafe harbor percentage
64	47.00	37.00
65	46.25	36.25
66	45.50	35.50
67	44.75	34.75
68	44.00	34.00
69	43.25	33.25
70	42.50	32.50
71	41.75	31.75
72	41.00	31.00
73	40.25	30.25
74	39.50	29.50
75	38.75	28.75
76	38.00	28.00
77	37.25	27.25
78	36.50	26.50
79	35.75	25.75
80	35.00	25.00
81	34.25	24.25
82	33.50	23.50
83	32.75	22.75
84	32.00	22.00
85	31.25	21.25
86	30.50	20.50
87	29.75	20.00
88	29.00	20.00
89	28.25	20.00
90	27.50	20.00
91	26.75	20.00
92	26.00	20.00
93	25.25	20.00
94	24.50	20.00
95	23.75	20.00
96	23.00	20.00
97	22.25	20.00
98	21.50	20.00
99	20.75	20.00

(5) *Examples.* The following examples illustrate the rules in this paragraph (c).

Example 1. Employer A has 200 nonexcludable employees, of whom 120 are nonhighly compensated employees and 80 are highly compensated employees. Employer A maintains a plan that benefits 60 nonhighly compensated employees and 72 highly compensated employees. Thus, the plan's ratio percentage is 55.56 percent ([60/120]/[72/80]=50%/90%=0.5556), which is below the percentage necessary to satisfy the ratio percentage test of § 1.410(b)–2(b)(2). The employer's nonhighly compensated employee concentration percentage is 60 percent (120/200); thus, Employer A's safe harbor percentage is 50 percent and its unsafe harbor percentage is 40 percent. Because the plan's ratio percentage is greater than the safe harbor percentage, the plan's classification satisfies the safe harbor of paragraph (c)(2) of this section.

Example 2. The facts are the same as in *Example 1,* except that the plan benefits only 40 nonhighly compensated employees. The plan's ratio percentage is thus 37.03 percent ([40/120]/[72/80]=33.33%/90%=0.3703). Under these facts, the plan's classification is below the unsafe harbor percentage and is thus considered discriminatory.

Example 3. The facts are the same as in *Example 1,* except that the plan benefits 45 nonhighly compensated employees. The plan's ratio percentage is thus 41.67 percent ([45/120]/[72/80]=37.50%/90%=0.4167), above the unsafe harbor percentage (40 percent) and below the safe harbor percentage (50 percent). The Commissioner may determine that the classification is nondiscriminatory after considering all the relevant facts and circumstances.

Example 4. Employer B has 10,000 nonexcludable employees, of whom 9,600 are nonhighly compensated employees and 400 are highly compensated employees. Employer B maintains a plan that benefits 600 nonhighly compensated employees and 100 highly compensated employees. Thus, the plan's ratio percentage is 25.00 percent ([600/9,600]/[100/400]=6.25%/25%=0.2500), which is below the percentage necessary to satisfy the ratio percentage test of § 1.410(b)–2(b)(2). Employer B's nonhighly compensated employee concentration percentage is 96 percent (9,600/10,000); thus, Employer B's safe harbor percentage is 23 percent, and its unsafe harbor percentage is 20 percent. Because the plan's ratio percentage (25.00 percent) is greater than the safe harbor percentage (23.00 percent), the plan's classification satisfies the safe harbor of paragraph (c)(2) of this section.

Example 5. The facts are the same as in *Example 4,* except that the plan benefits only 400 nonhighly compensated employees. The plan's ratio percentage is thus 16.67 percent ([400/9,600]/[100/400]=4.17%/25%=0.1667). The plan's ratio percentage is below the unsafe harbor percentage and thus the classification is considered discriminatory.

Example 6. The facts are the same as in *Example 4,* except that the plan benefits 500 nonhighly compensated employees. The plan's ratio percentage is thus 20.83 percent ([500/9,600]/[100/400]=5.21%/25%=0.2083), above the unsafe harbor percentage (20 percent) and below the safe harbor percentage (23 percent). The Commissioner may determine that the classification is nondiscriminatory after considering all the facts and circumstances.

§ 1.410(b)–5 Average benefit percentage test.

(a) *General rule.* A plan satisfies the average benefit percentage test of this section for a plan year if and only if the average benefit percentage of the plan for the plan year is at least 70 percent. A plan is deemed to satisfy this requirement if it satisfies paragraph (f) of this section for the plan year.

(b) *Determination of average benefit percentage.* The average benefit percentage of a plan for a plan year is the percentage determined by dividing the actual benefit percentage of the nonhighly compensated employees in plans in the testing group for the testing period that includes the plan year by the actual benefit percentage of the highly compensated employees in plans in the testing group for that testing period. See paragraph (d)(3)(ii) of this section for the definition of testing period.

(c) *Determination of actual benefit percentage.* The actual benefit percentage of a group of employees for a testing period is the average of the employee benefit percentages, calculated separately with respect to each of the employees in the group for the testing period. All nonexcludable employees of the employer are taken into account for this purpose, even if they are not benefiting under any plan that is taken into account.

(d) *Determination of employee benefit percentages*—(1) *Overview.* This paragraph (d) provides rules for determining employee benefit percentages. See paragraph (e) of this section for additional optional rules for determining employee benefit percentages.

(2) *Employee contributions and employee-provided benefits disregarded.* Only employer-provided contributions and benefits are taken into account in determining employee benefit percentages. Therefore, employee contributions (including both employee contributions allocated to separate accounts and employee contributions not allocated to separate accounts), and benefits derived from such contributions, are not taken into account in determining employee benefit percentages. For this purpose, the amount of benefits derived from employee contributions that are not allocated to separate accounts must be determined under the method in § 1.401(a)(4)–6(b)(1) (section 411(c) method), (b)(4) (grandfather rule for plans in existence on May 14, 1990), (b)(5) (government plan method), or (b)(6) (cessation-of-employee-contributions method). See paragraph (e)(5) of this section, however, for a rule allowing the safe harbor methods in § 1.401(a)(4)–6(b)(2) (composition-of-workforce method) and (b)(3) (minimum benefit method) to be used if certain conditions are satisfied.

(3) *Plans and plan years taken into account*—(i) *Testing group.* All plans included in the testing group under § 1.410(b)–7(e)(1), and only those plans, are taken into account in determining an employee's benefit percentage. See paragraph (e)(3) of this section, however, for an optional rule permitting employee benefit percentages to be determined separately with respect to defined benefit plans and defined contribution plans in the testing group.

(ii) *Testing period.* An employee's employee benefit percentage is determined on the basis of plan years ending with or within the same calendar year. These plan years are referred to in this section as the "relevant plan years" or, in the aggregate, as the "testing period." See paragraph (e)(9) of this section, however, for an optional rule permitting employee benefit percentages

to be determined over a three-year averaging period.

(4) *Contributions or benefits basis.* Employee benefit percentages may be determined on either a contributions or a benefits basis. Employee benefit percentages for any testing period must be determined on the same basis (contributions or benefits) for all plans in the testing group. See paragraph (e)(3) of this section, however, for an optional rule permitting employee benefit percentages to be determined separately with respect to defined benefit plans and defined contribution plans in the testing group.

(5) *Determination on a contributions basis.* If employee benefit percentages for a testing group are determined on a contributions basis for a testing period, each employee's employee benefit percentage is determined as follows—

(i) Determine the dollar amount of the allocations taken into account with respect to the employee under § 1.401(a)(4)–2(c)(2)(ii) for the relevant plan year for each defined contribution plan to which the permitted disparity rules of section 401(l) are available.

(ii) Determine the actuarial present value of the increase in the employee's normalized accrued benefit for the relevant plan year under each defined benefit plan to which the permitted disparity rules of section 401(l) are available, using the method prescribed in § 1.401(a)(4)–8(c)(2)(i)(A) through (C).

(iii) Add the allocations and equivalent allocations determined in paragraphs (d)(5)(i) and (ii) of this section, and divide the total by the employee's plan year compensation for any one of the relevant plan years in the testing period. A relevant plan year may not be used for this purpose unless the employee actually benefited under the plan for that plan year. In addition, a relevant plan year may not be used if it is a short plan year, unless it is the longest of any plan year in the testing period. Plan year compensation may not be limited to an employee's period of plan participation during a relevant plan year unless the period of participation taken into account includes the employee's longest period of participation in any plan in the testing group during that year. Plan year compensation for this purpose must be determined by applying the requirements of section 401(a)(17) as if all plans in the testing group were a single plan.

(iv) Adjust the amount determined in paragraph (d)(5)(iii) of this section by imputing permitted disparity to the extent allowed under the rules of § 1.401(a)(4)–7 using the method in § 1.401(a)(4)–7(b). This adjustment is permitted, but not required. If it is made with respect to any nonhighly compensated employee's employee benefit percentage under the testing group for a testing period, however, it must be made with respect to all highly compensated employees' employee benefit percentages under the testing group for the testing period. In determining an employee's adjusted allocation rate under § 1.401(a)(4)–7(b), the percentage amount determined under paragraph (d)(5)(iii) of this section is substituted for the employee's unadjusted allocation rate.

(v) Add the employee's allocations and equivalent allocations for the relevant plan year under any defined contribution or defined benefit plans to which the permitted disparity rules of section 401(l) are not available, using the rules in paragraphs (d)(5)(i) and (d)(5)(ii) of this section, and divide the total by the employee's plan year compensation used in paragraph (d)(5)(iii) of this section.

(vi) Add the rate determined in paragraph (d)(5)(v) of this section to the rate determined in paragraph (d)(5)(iv) of this section (or paragraph (d)(5)(iii) of this section, if permitted disparity is not taken into account). This is the employee's benefit percentage for the testing period with respect to the testing group.

(6) *Determination on a benefits basis.* If employee benefit percentages for a testing group are determined on a benefits basis for a testing period, each employee's employee benefit percentage is determined as follows—

(i) Determine the increase in the employee's normalized accrued benefit determined under § 1.401(a)(4)–3(d)(2)(i)(E) for the relevant plan year under each defined benefit plan to which the permitted disparity rules of section 401(l) are available.

(ii) Determine the dollar amount of the allocations taken into account with respect to the employee under § 1.401(a)(4)–2(c)(2)(ii) for the relevant plan year for each defined contribution plan to which the permitted disparity rules of section 401(l) are available, and convert these allocations into equivalent accruals using the method prescribed in § 1.401(a)(4)–8(b)(2)(i)(A) and (B).

(iii) Add the accruals and equivalent accruals determined in paragraphs (d)(6)(i) and (d)(6)(ii) of this section, and divide the total by the employee's plan year compensation for any one of the relevant plan years in the testing period. A relevant plan year may not be used for this purpose unless the employee actually benefited under the plan for that plan year. In addition, a relevant plan year may not be used if it is a short plan year, unless it is the longest of any plan year in the testing period. Plan year compensation may not be limited to an employee's period of plan participation during a relevant plan year unless the period of participation taken into account includes the employee's longest period of participation in any plan in the testing group during that year. Plan year compensation for this purpose must be determined by applying the requirements of section 401(a)(17) as if all plans in the testing group were a single plan.

(iv) Adjust the amount determined in paragraph (d)(6)(iii) of this section by imputing permitted disparity to the extent allowed under the rules of § 1.401(a)(4)–7 using the annual method in § 1.401(a)(4)–7(c)(4)(iv)(C). This adjustment is permitted, but not required. If it is made with respect to any nonhighly compensated employee's employee benefit percentage under the testing group for a testing period, however, it must be made with respect to all highly compensated employees' employee benefit percentages under the testing group for the testing period. In determining an employee's adjusted accrual rate under § 1.401(a)(4)–7(c), the percentage amount determined under paragraph (d)(6)(iii) of this section is substituted for the employee's unadjusted accrual rate.

(v) Add the employee's accruals and equivalent accruals for the relevant plan year under any defined benefit or defined contribution plans to which the permitted disparity rule of section 401(*l*) are not available, using the rules in paragraphs (d)(6)(i) and (d)(6)(ii) of the section, and divide the total by the employee's plan year compensation used in paragraph (d)(6)(iii) of this section.

(vi) Add the rate determined in paragraph (d)(6)(v) of this section to the rate determined in paragraph (d)(6)(iv) of this section (or paragraph (d)(6)(iii) of this section, if permitted disparity is not taken into account). This is the employee's employee benefit percentage for the testing period with respect to the testing group.

(7) *Requirements for certain plans providing early retirement benefits*—(i) *General rule.* If any defined benefit plan in the testing group provides for early retirement benefits in addition to normal retirement benefits to any highly compensated employee, and the average actuarial reduction for any one of these benefits commencing in the 5 years prior to the plan's normal retirement age is less than 4 percent per year, then the increase in the normalized accrued benefit used in paragraphs (d)(5)(ii),

(d)(5)(v), (d)(6)(i), and (d)(6)(v) of this section must be replaced by the largest amount determined under § 1.401(a)(4)–3(d)(2)(ii)(A) through (G).

(ii) *Exception.* Paragraph (d)(7)(i) of this section does not apply if early retirement benefits with average actuarial reductions described in that paragraph are currently available, within the meaning of § 1.401(a)(4)–4(b), under plans in the testing group to a percentage of nonexcludable nonhighly compensated employees that is at least 70 percent of the percentage of nonexcludable highly compensated employees to whom these benefits are currently available.

(8) *Use of optional methods provided in section 401(a)(4) regulations*—(i) *General rule.* Except as otherwise provided in this paragraph (d), and optional methods or rules for determining allocations, accruals, compensation, and other items that are used in determining employee benefit percentages under this section that would be available in determining whether a plan satisfies the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2) may be used in determining employee benefit percentages under this section, provided that the optional methods or rules selected are applied on a consistent basis to all employees in the testing group. Thus, for example, employee benefits percentages may generally be calculated using any of the alternative methods of determining plan year compensation under § 1.401(a)(4)–12, and using any underlying definition of compensation that satisfies section 414(s). On the other hand, employee benefit percentages may not be calculated using the projected method in § 1.401(a)(4)–3(d)(4), the grouping rules in § 1.401(a)(4)–3(d)(6)(iv), or the floor on most valuable accrual rates in § 1.401(a)(4)–3(d)(6)(v), for example, since those rules relate exclusively to the determination of accrual rates, and not to the determination of allocations, accruals, compensation, or other items actually used in determining employee benefit percentages under this section.

(ii) *Certain restrictions on options involving defined benefit plans.* Optional methods or rules described in paragraph (d)(8)(i) of this section that may not be used in determining whether a DB/DC plan (within the meaning of § 1.401(a)(4)–9(a)) satisfies the nondisciminatory amount requirement of § 1.401(a)(4)–1(b)(2) also may not be used in determining employee benefit percentages, regardless of whether such percentages are determined on a contributions or benefits basis. See § 1.401(a)(4)–9(b)(2)(v)(B). Thus, for example, alternative actuarial assumptions available under § 1.401(a)(4)–3(d)(5)(iv)(B) may not be used unless they are standard interest rates or mortality assumptions based on a standard mortality table (as defined in § 1.401(a)(4)–12) plan provisions providing for actuarial increases after normal retirement age under § 1.401(a)(4)–3(f)(3) may not be disregarded, and benefits may not be determined other than on a plan-year basis under § 1.401(a)(4)–3(f)(6). Further, as noted in paragraph (d)(2) of this section, the amount of benefits derived from employee contributions not allocated to a separate account must be determined under the method in § 1.401(a)(4)–6(b)(1) (section 411(c) method), (b)(4) (grandfather rule for plans in existence on May 14, 1990), (b)(5) (government plan method), or (b)(6) (cessation-of-employee-contributions method). See paragraph (e)(5) of this section, however, for an optional rule permitting certain of these optional methods and rules to be used when employee benefit percentages are determined separately with respect to defined benefit and defined contribution plans in the testing group.

(9) *Determination of testing age*—(i) *General rule.* For purposes of this section, an employee's testing age must be determined under this definition of testing age in § 1.401(a)(4)–12 as if all plans in the testing group were a single plan. Thus, for example, in determining the increase in an employee's normalized accrued benefit for a relevant plan year for purposes of paragraph (d)(6)(i) of this section, benefits must be normalized to the same testing age for all employees, and the same testing age must be used in determining the employee's equivalent accruals for purposes of paragraph (d)(6)(ii) of this section.

(ii) *Different ages permitted under certain conditions.* Notwithstanding paragraph (d)(9)(i) of this section, employee benefit percentages may be determined using the respective testing ages determined for each plan in the testing group, if it is reasonable to believe that use of the different testing ages for different plans does not result in an average benefit percentage that is significantly higher than the average benefit percentage that would be determined using a single testing age for all plans in the testing group.

(e) *Additional optional rules*—(1) *Overview.* This paragraph (e) contains various optional rules that may be used, alone or in combination, by an employer in determining employee benefit percentages for a testing period. Except as specifically provided, each optional rule used for a testing period must be applied, to the extent possible, on a consistent basis in determining the employee benefit percentages of all employees under all plans in the testing group for that testing period. It is not necessary, however, that a rule be used consistently from testing period to testing period. The rules in this paragraph (e) supplement and do not replace the rules in paragraph (d) of this section. Thus, for example, unless otherwise provided, the rules of paragraph (d)(7) of this section (regarding plans providing subsidized early retirement benefits) and of paragraph (d)(8) of this section (restricting the use of optional methods provided in the section 401(a)(4) regulations) continue to apply.

(2) *Determination of employee benefit percentages as sum of separately determined rates*—(i) *General rule.* If employee benefit percentages are determined on a contributions basis, an employer may substitute the sum of an employee's separately-determined allocation or equivalent allocation rates for the testing period under all plans in the testing group for the percentage amount determined in paragraph (d)(5)(vi) of this section. Similarly, if employee benefit percentages are determined on a benefits basis, an employer may sustitute the sum of an employee's separately-determined accrual or equivalent accrual rates for the testing period under all plans in the testing group for the percentage amount determined in paragraph (d)(6)(vi) of this section.

(ii) *Determination of rates.* For purposes of this paragraph (e)(2), an employee's allocation and accrual rates are determined under the rules of §§ 1.401(a)(4)–2(c)(2) and 1.401(a)(4)–3(d)(2)(i), respectively, and an employee's equivalent accrual and allocation rates are determined under the rules of §§ 1.401(a)(4)–8(b)(2)(i) and (c)(2)(i), respectively. If paragraph (d)(7) of this section requires employee benefit percentages to be determined by taking early retirement benefits into account, an employee's most valuable accrual and most valuable equivalent allocation rates, as determined under §§ 1.401(a)(4)–3(d)(2)(ii) and 1.401(a)(4)–8(c)(2)(ii), must be substituted for the employee's accrual and equivalent allocation rates.

(iii) *Treatment of permitted disparity.* Permitted disparity may be taken into account in determining an employee's actual or equivalent accrual or allocation rates to the extent allowed

under the rules of § 1.401(a)(4)–7. If permitted disparity is taken into account in determining an employee's actual or equivalent accrual or allocation rate under any one plan in the testing group, it may not be taken into account in determining the employee's actual or equivalent accrual or allocation rates under any other plan in the testing group.

(iv) *Determination of compensation*—(A) *Plan year compensation used as testing compensation.* If employee benefit percentages are determined on a benefits basis, an employee's plan year compensation must be used for purposes of § 1.401(a)(4)–3(e)(3)(i) as the employee's testing compensation in determining the employee's actual or equivalent accrual rates for purposes of this paragraph (e)(2).

(B) *Consistency requirement.* Under the consistency requirement of paragraphs (d)(8) and (e)(1) of this section, the same period must generally be used to determine each employee's plan year compensation used in determining the employee's actual and equivalent allocation and accrual rates under paragraph (e)(2)(ii) of this section under all plans in the testing group. This consistency requirement is not treated as violated, however, merely because the periods for determining employees' plan year compensation differ for different plans in the testing group because the plans have different plan years. Furthermore, this consistency requirement is not treated as violated merely because different optional determination periods permitted under the definition of plan year compensation in § 1.401(a)(4)–12 (e.g., the plan year or a 12-month period ending in the plan year) are used in determining employees' actual or equivalent accrual or allocation rates under one or more plans in the testing group, provided that the period is actually used in determining whether the plan satisfies the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2) for the relevant plan year.

(3) *Determination of employee benefit percentages without regard to plans of a different type*—(i) *General rule.* An employer may determine employee benefit percentages under plans of one type (i.e., defined benefit or defined contribution plans) without regard to plans of a different type (i.e., defined contribution or defined benefit plans, respectively), using the method provided in this paragraph (e)(3). If this method is used to determine whether a defined benefit plan satisfies the average benefit percentage test, employee benefit percentages under all defined benefit plans in the testing group must be determined on a benefits basis, and all allocations under any defined contribution plans in the same testing group must be treated as zero. Thus, for example, if all of the defined contribution plans in a testing group satisfy the ratio percentage test of § 1.410(b)–2(b)(2), these plans are not required to satisfy the average benefit percentage test, and are also disregarded in determining whether any defined benefit plans in the testing group satisfy the average benefit percentage test. If this method is used to determine whether a defined contribution plan satisfies the average benefit percentage test, employee benefit percentages under all defined contribution plans in the testing group must be determined on a contributions basis, and all benefits under any defined benefit plans in the same testing group must be treated as zero. Employees may not be treated as excludable employees solely because they are deemed to receive no benefit accrual or allocation under a plan under this optional method. This optional method may not be used for a testing period if any of the plans in the testing group relies on any of the cross-testing methods provided in § 1.401(a)(4)–8 (b)(2) or (c)(2) to satisfy section 401(a)(4) for a relevant plan year.

(ii) *Effect of use of separate testing group determination method.* A plan does not satisfy the average benefit percentage test using the method provided in this paragraph (e)(3) unless each of the plans of the employer of a different type (i.e., defined benefit plan or defined contribution plan) than the plan being tested satisfies the average benefit test of § 1.410(b)–2(b)(3) using this method or satisfies the ratio percentage test of § 1.410(b)–2(b)(2).

(iii) *Treatment of permitted disparity*—(A) *Plans of both types using method.* If the method provided in this paragraph (e)(3) is used to determine whether one or more defined benefit plans and one or more defined contribution plans in a testing group satisfy the average benefit percentage test, permitted disparity may generally be taken into account, to the extent permitted under this section, in determining employee benefit percentages with respect to both the group of defined benefit plans in the testing group and the group of defined contribution plans in the testing group. If any employee benefits under both a defined benefit and a defined contribution plan in the testing group in the testing period, however, permitted disparity may be taken into account for any employee in any plan in the testing group only with respect to the group of defined benefit plans in the testing group, or with respect to the group of defined contribution plans in the testing group, but not both.

(B) *Plans of only one type using method.* If the method in this paragraph (e)(3) is used to determine whether one or more defined benefit plans or one or more defined contribution plans in a testing group, but not plans of both types, satisfy the average benefit percentage test (for example, where each plan in one group of plans satisfies the ratio percentage test of § 1.410(b)–2(b)(2)), permitted disparity may be taken into account in determining employee benefit percentages under the group of plans subject to the average benefit percentage test only for those employees with respect to whom permitted disparity is not taken into account (i.e., either under section 401(*l*) or § 1.401(a)(4)–7), in testing any plans in the other group for nondiscrimination under section 401(a)(4). For this purpose, permitted disparity is treated as taken into account with respect to all employees benefiting under a section 401(*l*) plan.

(iv) *Consistency rules.* If the method in this paragraph (e)(3) is used, the consistency requirement of paragraphs (d)(8) and (e)(1) of this section may be applied separately with respect to the group of defined benefit plans and the group of defined contribution plans in the testing group.

(v) *Example.* Employer A maintains two defined benefit plans, neither of which covers a group of employees that satisfies the ratio percentage test of § 1.410(b)–2(b)(2), and a profit-sharing plan and a section 401(k) plan, each of which benefits a group of employees that satisfies the ratio percentage test of § 1.410(b)–2(b)(2). The defined benefit plans will satisfy the average benefit percentage test if the ratio of the actual benefit percentages of all nonexcludable nonhighly compensated employees, computed on a benefits basis without regard to contributions under the profit-sharing plan or the section 401(k) plan, is at least 70 percent of the actual benefit percentage of all nonexcludable highly compensated employees, computed on a benefits basis without regard to contributions under the profit-sharing plan or the section 401(k) plan.

(4) *Accrued-to-date method*—(i) *General rule.* An employer may use the accrued-to-date method to determine an employee's employee benefit percentage on a benefits basis under paragraph (d)(6) of this section. If this method is used, the accrual used in paragraph (d)(6) (i) and (v) of this section is replaced with the amount determined for the employee under § 1.401(a)(4)–

3(d)(3)(i) (A) through (C) (or, if paragraph (d)(7) of this section requires employee benefit percentages to be determined by taking early retirement benefits into account, the largest amount determined for the employee under § 1.401(a)(4)–3(d)(3)(ii) (A) through (E)). Also, the allocations used in paragraphs (d)(6)(ii) and (d)(6)(v) of this section are replaced by the employee's adjusted account balance, as defined in § 1.401(a)(4)–8(b)(2)(ii)(C), divided by the employee's testing service, as defined in § 1.401(a)(4)–12. Finally, the employee's plan year compensation (modified as provided in § 1.401(a)(4)–3(e)(3)(ii)) is used in lieu of the employee's plan year compensation in paragraphs (d)(6)(iii) and (d)(6)(v) of this section.

(ii) *Application to separate rate method.* If the accrued-to-date method provided in this paragraph (e)(4) is used in combination with the optional rule for determining employee benefit percentages as the sum of separately determined rates provided in paragraph (e)(2) of this section, an employee's actual and equivalent accrual rates must be determined using the accrued-to-date method in §§ 1.401(a)(4)–3(d)(3)(i) (or, if paragraph (d)(7) of this section requires employee benefit percentages to be determined by taking early retirement benefits into account, § 1.401(a)(4)–3(d)(3)(ii)) and 1.401(a)(4)–8(b)(2)(ii), respectively.

(iii) *Treatment of permitted disparity.* If the accrued-to-date method provided in this paragraph (e)(4) is used, disparity must be imputed, if at all, using the accrued-to-date method in § 1.401(a)(4)–7(c)(4)(iv)(D). In imputing permitted disparity for this purpose, the employee's plan year compensation, modified as provided in § 1.401(a)(4)–3(e)(3)(ii), must be used, notwithstanding § 1.401(a)(4)–7(c)(4)(vi) (generally requiring the use of average annual compensation).

(iv) *Uniform testing service assumption.* If the average of the testing service as defined in § 1.401(a)(4)–12 for the nonhighly compensated employees in a plan in the testing group is no greater than the average of the testing service for the highly compensated employees in that plan, an employer may assume that all employees in that plan have the same number of years of testing service for purposes of dividing an employee's benefit or adjusted account balance under that plan by the employee's testing service in paragraph (e)(4)(i) of this section. The years of testing service selected must be a reasonable approximation of the average testing service of either the highly compensated employees or the nonhighly compensated employees, or an amount in between.

(v) *Fresh-start alternative.* The consistency requirements of paragraphs (d)(8) and (e)(1) of this section are not violated merely because the option to disregard allocations made or benefits accrued for plan years that begin before a fresh-start date described in § 1.401(a)(4)–3(d)(6)(vii) or 1.401(a)(4)–8(b)(2)(ii)(B) is used by some but not all plans in the testing group, or if different fresh-start dates are used by different plans in the testing group. In applying § 1.401(a)(4)–3(d)(6)(vii) to determine an employee's employee benefit percentage, any adjustments provided for under § 1.401(a)(4)–13(d) are not included in the frozen accrued benefit as of the fresh-start date under § 1.401(a)(4)–3(d)(6)(vii)(B)(*2*) (or § 1.401(a)(4)–3(d)(6)(vii)(C)(*2*) if paragraph (d)(7) of this section requires employee benefit percentages to be determined by taking into account early retirement benefits), unless the only plans included in the testing group are defined benefit plans, or the option provided in this paragraph (e)(4) is applied solely to defined benefit plans tested under the method in paragraph (e)(3) of this section.

(5) *Optional computation methods provided under section 401(a)(4).* If the only plans included in the testing group are defined benefit plans (or the option is applied solely to defined benefit plans tested under the method in paragraph (e)(3) of this section), and if employee benefit percentages under these defined benefit plans are determined on a benefits basis, then, notwithstanding the consistency requirement of paragraphs (d)(8) and (e)(1) of this section, any of the optional methods for determining the accruals, compensation and other items that are used in determining employee benefit percentages under this section that would be available in determining whether a plan satisfies the nondiscriminatory amount requirement of § 1.401(a)(4)–1(b)(2) may also be used for purposes of this section. Thus, for example, if the conditions on use of the option in this paragraph (e)(5) are satisfied, employee benefit percentages may be determined using any of the alternative actuarial assumptions permitted under § 1.401(a)(4)–3(d)(5)(iv)(B); plan provisions providing for an actuarial increase in benefits after normal retirement age under § 1.401(a)(4)–3(f)(3) may be disregarded; and accruals may be determined other than on a plan year basis under § 1.401(a)(4)–3(f)(6). In addition, if the conditions on use of the option in this paragraph (e)(5) are satisfied, the safe harbor methods of § 1.401(a)(4)–6(b)(2) (composition-of-workforce method) or (b)(3) (minimum benefit method) may be used in determining employees' accrual rates for purposes of paragraph (e)(2)(ii) of this section. As noted in paragraph (d)(8)(i) of this section, except as otherwise provided in this section, optional methods for adjusting employees' actual or equivalent normal or most valuable accrual rates are not available in determining employee benefit percentages.

(6) *Alternative annual method for determining employee benefit percentages for certain defined benefit plans.* An employer may substitute for the increase in an employee's normalized accrued benefit under a plan for the relevant plan year in paragraphs (d)(6) (i) and (v) of this section an amount determined by: determining the ratio of the normalized accrued benefit in § 1.401(a)(4)–3(d)(2)(i)(D) to the employee's testing compensation as defined in § 1.401(a)(4)–3(e)(3) for the prior relevant plan year, and the ratio of the normalized accrued benefit in § 1.401(a)(4)–3(d)(2)(i)(C) to the employee's testing compensation for the current relevant plan year; determining the excess (if any) of the second ratio over the first ratios; and multiplying the difference by the employee's testing compensation for the current relevant plan year. If paragraph (d)(7)(i) of this section requires employee benefit percentages to be determined by taking early retirement benefits into account, the employer must substitute the largest of the sums of the normalized QJSAs and QSUPPs determined for each age in § 1.401(a)(4)–3(d)(2)(ii)(C) for the normalized accrued benefit for the current relevant plan year, and the largest of the sums of the normalized QJSAs and QSUPPs determined for each age in § 1.401(a)(4)–3(d)(2)(ii)(D) for the normalized accrued benefit for the prior relevant plan year in the previous sentence. If this method is used, the testing compensation used in determining the increase in an employee's normalized accrued benefit must also be used, subject to the requirements of paragraph (e)(10) of this section, for purposes of paragraph (d)(6)(iii) of this section. This method may not be used unless the only plans included in the testing group are defined benefit plans (or the method is applied to defined benefit plans tested under the method in paragraph (e)(3) of this section), and employee benefit percentages under these defined benefit plans are determined on a benefits basis.

(7) *Alternative method for converting benefits to contributions.* An employer may convert an employee's most valuable accruals under a defined benefit plan for a relevant plan year into equivalent most valuable allocations for purposes of paragraph (d)(5) (ii) and (v) of this section using the method used by the employer for determining any increase in current liability (as defined in section 412(*l*)(7)) that are attributable to the employee for the year. For this purpose, current liability may include amounts attributable to projected accruals for the relevant plan year for which the determination of current liability is being made, if the projections are made on a reasonable basis applied consistently from year to year. Thus, for example, an employer may treat any increase in current liability attributable to an employee under a plan from one relevant plan year to the next as the employee's equivalent most valuable allocation for the second year.

(8) *Imputation of permitted disparity*—(i) *Use of excess benefit and gross benefit percentages.* An employee's excess benefit percentage under a defined benefit excess plan, or gross benefit percentage under an offset plan, multiplied by the employee's average annual compensation used under the plan in determining benefit accruals, may be substituted for the amount determined under paragraph (d)(6)(i) of this section as provided in this paragraph (e)(8)(i). If the option in paragraph (e)(2) of this section is used, permitted disparity may be taken into account under paragraph (e)(2)(iii) of this section by substituting an employee's excess benefit percentage or gross benefit percentage for the rate that would otherwise be determined under paragraph (e)(2)(iii) of this section. Neither of these methods may be used unless—

(A) The only plans included in the testing group are defined benefit plans (or the method is applied to defined benefit plans tested under the method in paragraph (e)(3) of this section, and those plans are allowed to impute permitted disparity under that paragraph), and employee benefit percentages under these defined benefit plans are determined on a benefits basis.

(B) Employee benefit percentages under the plans in the testing group are not required to be determined by taking into account early retirement benefits under paragraph (d)(7) of this section.

(C) The defined benefit excess plan or offset plan either is a section 401(*l*) plan that satisfies the ratio percentage test of § 1.410(b)–2(b)(2), or consists exclusively of component plans (as defined in § 1.401(a)(4)–9(c)) each of which is a section 401(*l*) plan that separately satisfies the ratio percentage test of § 1.410(b)–2(b)(2).

(D) Permitted disparity is imputed, to the extent possible, under paragraph (d)(6)(iv) of this section (or paragraph (e)(2)(iii) of this section, if applicable) with respect to all other defined benefit plans in the testing group, but only for employees not benefiting under the defined benefit excess plan or offset plan.

(ii) *Uniform compensation assumption.* For purposes of imputing disparity under paragraphs (d)(5)(iv) and (d)(6)(iv) of this section, the compensation of an employee who is benefiting only under one or more plans in the testing group that do not determine benefit accruals or allocations by reference to individual employees' compensation for example, plans granting flat dollar accruals for each year of service) may be deemed to be equal to the average compensation of all nonexcludable employees benefiting under such plans. This average must be determined using the method actually used to determine the employee's compensation for purposes of this section, or, if none, any other uniform method permitted under this section. In addition, the covered compensation of the employee may be determined based on the average age of all such nonexcludable employees benefiting under such plans. Covered compensation is defined in § 401(*l*)–1(c)(7).

(9) *Three-year averaging period*—(i) *General rule.* An employer may determine an employee's employee benefit percentage for a testing period as the average of the employee's employee benefit percentages determined separately for the testing period and for the immediately preceding one or two testing periods (referred to in this section as an "averaging period").

(ii) *Consistency rule.* Employee benefit percentages of a particular employee that are averaged together within an averaging period must be determined on a consistent basis. Thus, for example, they must be determined as a percentage of the same definition of compensation.

(10) *Alternative methods of determining compensation*—(i) *Use of average annual compensation.* If employee benefit percentages are determined on a benefits basis (or the option provided in this paragraph (e)(10)(i) is applied exclusively to defined benefit plans tested on a benefits basis under the method in paragraph (e)(3) of this section), an employee's average annual compensation as defined in § 1.401(a)(4)–3(e)(2) may be used in lieu of plan year compensation for purposes of paragraph (d)(6)(iii), (e)(2), or (e)(4) of this section.

(ii) *Rules for determining whether alternative definitions are discriminatory.* As under section 401(a)(4), an underlying definition of compensation that is not a definition described in § 1.414(s)–1(c) may not be used in determining employee benefit percentages unless the definition satisfies the requirements of § 1.414(s)–1(d) applicable to alternative definitions of compensation, including the nondiscrimination requirement of § 1.414(s)–1(d)(3). All employees taken into account in determining whether the average benefit percentage test is satisfied who benefit under one or more plans in the testing group are taken into account in determining whether this nondiscrimination requirement is satisfied. See § 1.414(s)–1(d)(3)(iii). The nondiscrimination requirement of § 1.414(s)–1(d)(3) is deemed to be met for purposes of the average benefit percentage test, however, if it is reasonable to believe that the definition used does not result in an average benefit percentage that is significantly higher than the average benefit percentage that would be determined using a definition that actually satisfies the nondiscrimination requirement in § 1.414(s)–1(d)(3) taking into account all employees in all plans in the testing group.

(iii) *Use of different definitions for different groups of employees.* Notwithstanding the consistency requirement of paragraphs (d)(8) and (e)(1) of this section, different periods for determining compensation otherwise permitted under this section, and different underlying definitions of compensation, may be used to determine employee benefit percentages for employees benefiting under different plans or groups of plans in the testing group, if both of the following requirements are satisfied—

(A) It is reasonable to believe that use of different methods of determining compensation, or different underlying definitions of compensation, for different groups of employees does not result in an average benefit percentage that is significantly higher than the average benefit percentage that would be determined using the same method of determining compensation, and the same underlying definition of compensation, to determine the employee benefit percentages for all employees in all plans in the testing group.

(B) If any of the underlying definitions of compensation used to measure the compensation of employees in a plan or group of plans is not described in § 1.414(s)–1(c), and thus must satisfy the nondiscrimination requirement of § 1.414(s)–1(d)(3), the definition would satisfy that nondiscrimination requirement if the only employees taken into account were the employees in the plan or group of plans to which the definition is applied. The special rule in paragraph (e)(10)(ii) of this section for determining whether those requirements are satisfied may not be used for this purpose.

(f) *Special rule for certain collectively bargained plans.* A plan (as determined without regard to the mandatory disaggregation rule of § 1.410(b)–7(c)(5)) that benefits both collectively bargained employees and noncollectively bargained employees is deemed to satisfy the average benefit percentage test of this section if—

(1) The provisions of the plan applicable to each employee in the plan are identical to the provisions of the plan applicable to every other employee in the plan, including the plan benefit of allocation formula, any optional forms of benefits, any ancillary benefit, and any other right or feature under the plan, and

(2) The plan would satisfy the ratio percentage test of § 1.410(b)–2(b)(2), if §§ 1.410(b)–6(d) and 1.410(b)–7(c)(5) (the excludable employee and mandatory disaggregation rules for collectively bargained and noncollectively bargained employees) did not apply.

§ 1.410(b)–6 Excludable employees.

(a) *Employees*—(1) *In general.* For purposes of applying section 410(b) with respect to employees, all employees of the employer, other than the excludable employees described in paragraphs (b) through (h) of this section, are taken into account. Excludable employees are not taken into account with respect to a plan even if they are benefiting under the plan, except as otherwise provided in paragraph (b) of this section.

(2) *Rules of application.* Except as specifically provided otherwise, excludable employees are determined separately with respect to each plan for purposes of testing that plan under section 410(b). Thus, in determining whether a particular plan satisfies the ratio percentage test of § 1.410(b)–2(b)(2), paragraphs (b) through (h) of this section are applied solely with reference to that plan. Similarly, in determining whether two or more plans that are permissively aggregated and treated as a single plan under § 1.410(b)–7(d) satisfy the ratio percentage test of § 1.410(b)–2(b)(2), paragraphs (b) through (h) of this section are applied solely with reference to the deemed single plan. In determining whether a plan satisfies the average benefit percentage test of § 1.410(b)–5, the rules of this section are applied by treating all plans in the testing group as a single plan.

(b) *Minimum age and service exclusions*—(1) *In general.* If a plan applies minimum age and service eligibility conditions permissible under section 410(a)(1) and excludes all employees who do not meet those conditions from benefiting under the plan, then all employees who fail to satisfy those conditions are excludable employees with respect to that plan. An employee is treated as meeting the age and service requirements on the date any employee with the same age and service would be eligible to commence participation in the plan, as provided in section 410(b)(4)(C).

(2) *Multiple age and service conditions.* If a plan, including a plan for which an employer chooses the treatment under paragraph (b)(3) of this section, has two or more different sets of minimum age and service eligibility conditions, those employees who fail to satisfy all of the different sets of age and service conditions are excludable employees. Except as provided in paragraph (b)(3) of this section, an employee who satisfies any one of the different sets of conditions is not an excludable employee.

(3) *Plans benefiting certain otherwise excludable employees*—(i) *In general.* An employer may treat a plan benefiting otherwise excludable employees as two separate plans, one for the otherwise excludable employees and one for the other employees benefiting under the plan. See § 1.410(b)–7(c)(3) regarding permissive disaggregation of plans benefiting otherwise excludable employees. The effect of this rule is that employees who would be excludable under paragraph (b)(1) of this section (applied without regard to section 410(a)(1)(B)) but for the fact that the plan does not apply the greatest permissible minimum age and service conditions may be treated as excludable employees with respect to the plan. This treatment is available only if the plan satisfies section 410(b) and § 1.410(b)–2 with respect to these otherwise excludable employees in the manner described in paragraph (b)(3)(ii) of this section.

(ii) *Testing portion of plan benefiting otherwise excludable employees.* In determining whether the plan that benefits employees who would otherwise be excludable under paragraph (b)(1) of this section (applied without regard to section 410(a)(1)(B)) satisfies section 410(b) and § 1.410(b)–2, employees who have satisfied the greatest permissible minimum age and service conditions with respect to the plan are excludable employees. In addition, if the plan being tested applies minimum age and service conditions and those conditions are less than the maximum permissible minimum age and service conditions, employees who have not satisfied the lower minimum age and service conditions actually provided for in the plan are excludable employees. Thus, for example, if the plan requires attainment of age 18 and 3 months of service, employees who have not attained age 18 or 3 months of service with the employer are excludable employees.

(4) *Examples.* The following examples illustrate the minimum age and service condition rules of this paragraph (b). In each example, the employer is not treated as operating qualified separate lines of business under section 414(r).

Example 1. An employer maintains Plan A for hourly employees and Plan B for salaried employees. Plan A has no minimum age or service condition. Plan B has no minimum age condition and requires 1 year of service. The employer treats Plans A and B as a single plan for purposes of section 410(b). Because Plan A imposes no minimum age or service condition, all employees of the employer automatically satisfy the minimum age and service conditions of Plan A. Therefore, no employees are excludable under this paragraph (b) in testing Plans A and B for purposes of section 410(b).

Example 2. An employer maintains three plans. Plan C benefits employees in Division C who satisfy the plan's minimum age and service condition of age 21 and 1 year of service. Plan D benefits employees in Division D who satisfy the plan's minimum age and service condition of age 18 and 1 year of service. Plan E benefits employees in Division E who satisfy the plan's minimum age and service condition of age 21 and 6 months of service. The employer treats Plans D and E as a single plan for purposes of section 410(b). In testing Plan C under the ratio percentage test or the nondiscriminatory classification test of section 410(b), employees who are not at least age 21 or who do not have at least 1 year of service are excludable employees under paragraph (b)(1) of this section. In testing Plans D and E, employees who do not satisfy the age and service requirements of either of the two plans are excludable employees under paragraph (b)(2) of this section. Thus, an employee is excludable with respect to Plans D and E only if the employee is not at least age 18 with at least 1 year of service or is not at least age 21 with at least 6 months of service. Thus, an employee who is 19 years old and has 11 months of service is excludable. Similarly, an employee who is 17

years old and has performed 2 years of service is also excludable.

Example 3. An employer maintains three plans. Plan F benefits all employees in Division F (the plan does not apply any minimum age or service condition). Plan G benefits employees in Division G who satisfy the plan's minimum age and service condition of age 18 and 1 year of service. Plan H benefits employees in Division H who satisfy the plan's minimum age and service condition of age 21 and 6 months of service. In testing the employer's plans under the average benefit percentage test provided in § 1.410(b)–5, Plans F, G, and H are treated as a single plan and, as such, use the lowest minimum age and service condition under the rule of paragraph (b)(2) of this section. Therefore, because Plan F does not apply any minimum age or service condition, no employee is excludable under this paragraph (b).

Example 4. An employer maintains Plan J, which does not apply any minimum age or service conditions. Plan J benefits all employees in Division 1 but does not benefit employees in Division 2. Although Plan J has no minimum age or service condition, the employer wants to exclude employees whose age and service is below the permissible minimums provided in section 410(b)(1)(A). The employer has 110 employees who either do not have 1 year of service or are not at least age 21. Of these 110 employees, 10 are highly compensated employees and 100 are nonhighly compensated employees. Five of these highly compensated employees, or 50 percent, work in Division 1 and thus benefit under Plan J. Thirty-five of these nonhighly compensated employees, or 35 percent, work in Division 1 and thus benefit under Plan J. Plan J satisfies the ratio percentage test of section 410(b) with respect to employees who do not satisfy the greatest permissible minimum age and service requirement because the ratio percentage of that group of employees is 70 percent. Thus, in determining whether or not Plan J satisfies section 410(b), the 110 employees may be treated as excludable employees in accordance with paragraph (b)(3)(i) of this section.

(c) *Certain nonresident aliens*—(1) *General rule.* An employee who is a nonresident alien (within the meaning of section 7701(b)(1)(B)) and who receives no earned income (within the meaning of section 911(d)(2)) from the employer that constitutes income from sources within the United States (within the meaning of section 861(a)(3)) is treated as an excludable employee.

(2) *Special treaty rule.* In addition, an employee who is a nonresident alien (within the meaning of section 7701(b)(1)(B)) and who does receive earned income (within the meaning of section 911(d)(2)) from the employer that constitutes income from sources within the United States (within the meaning of section 861(a)(3)) is permitted to be excluded, if all of the employee's earned income from the employer from sources within the United States is exempt from United States income tax under an applicable income tax convention. This paragraph (c)(2) applies only if all employees described in the preceding sentence are so excluded.

(d) *Collectively bargained employees*—(1) *General rule.* A collectively bargained employee is an excludable employee with respect to a plan that benefits solely noncollectively bargained employees. If a plan (within the meaning of § 410(b)–7(b)) benefits both collectively bargained employees and noncollectively bargained employees for a plan year, § 1.410(b)–7(c)(5) provides that the portion of the plan that benefits the collectively bargained employees is treated as a separate plan from the portion of the plan that benefits the noncollectively bargained employees. Thus, a collectively bargained employee is always an excludable employee with respect to the mandatorily disaggregated portion of any plan that benefits noncollectively bargained employees.

(2) *Definition of collectively bargained employee*—(i) *In general.* A collectively bargained employee is an employee who is included in a unit of employees covered by an agreement that the Secretary of Labor finds to be a collective bargaining agreement between employee representatives and one or more employers, provided that there is evidence that retirement benefits were the subject of good faith bargaining between employee representatives and the employer or employers. An employee is a collectively bargained employee regardless of whether the employee benefits under any plan of the employer. See section 7701(a)(46) and § 301.7701–17T (Temporary) of this Chapter for additional requirements applicable to the collective bargaining agreement.

(ii) *Special rules for certain employees who cease to be collectively bargained employees*—(A) *Employees who were collectively bargained employees in prior plan year.* An employee who was a collectively bargained employee throughout the prior plan year, but who ceases to be a collectively bargained employee during the current plan year, may be treated as a collectively bargained employee until the end of the current plan year if the collective bargaining agreement that covers the unit of employees of which the employee was a member in the prior plan year requires the employee to benefit, in the current plan year, under a multiemployer plan maintained pursuant to the collective bargaining agreement. For plan years beginning before January 1, 1992, any employee may be treated as a collectively bargained employee for a plan year if a collective bargaining agreement required the employee to benefit, for that year, under a multiemployer plan maintained pursuant to the collective bargaining agreement.

(B) *Employees who were collectively bargained employees during a portion of the current plan year.* An employee who performs services for an employer that is a party to a collective bargaining agreement that requires the employee to benefit under a multiemployer plan both as a collectively bargained employee and as a noncollectively bargained employee during a plan year may be treated as a collectively bargained employee with respect to all of the employee's hours of service during the plan year provided that at least half of the employee's hours of service during the plan year are performed as a collectively bargained employee.

(C) *Consistency requirement.* The rules in paragraph (d)(2)(i) and (ii) of this section must be applied to all employees on a reasonable and consistent basis for the plan year.

(iii) *Covered by a collective bargaining agreement.*—(A) *General rule.* For purposes of paragraph (d)(2)(i) of this section, an employee is included in a unit of employees covered by a collective bargaining agreement if and only if the employee is represented by a bona fide employee representative that is a party to the collective bargaining agreement under which the plan is maintained. Thus, for example, an employee of either a plan or the employee representative that is a party to the collective bargaining agreement under which the plan is maintained is not included in a unit of employees covered by the collective bargaining agreement under which the plan is maintained merely because the employee is covered under the plan pursuant to an agreement entered into by the plan or employee representative on behalf of the employee (other than in the capacity of an employee representative with respect to the employee). This is the case even if all of such employees benefiting under the plan constitute only a de minimis percentage of the total employees benefiting under the plan.

(B) *Plans covering professional employees*—(*1*) *In general.* An employee is not considered included in a unit of employees covered by a collective bargaining agreement for a plan year for purposes of paragraph (d)(2)(iii)(A) of this section if, for the plan year, more than 2 percent of the employees who are covered pursuant to the agreement are professionals. This rule applies to all employees under the agreement,

nonprofessionals as well as professionals. Thus, no employees covered by such an agreement are excludable employees with respect to employees who are not covered by a collective bargaining agreement.

(*2*) *Multiple collective bargaining agreements.* This paragraph (d)(2)(iii)(B) is applied separately with respect to each collective bargaining agreement. Thus, for example, if a plan benefits two groups of employees, one included in a unit of employees covered by collective bargaining agreement X, more than 2 percent of whom are professionals, and another included in a unit of employees covered by collective bargaining agreement Y, none of whom are professionals, the group covered by agreement X is not considered covered by a collective bargaining agreement and the group covered by agreement Y is considered covered by a collective bargaining agreement.

(*3*) *Application of minimum coverage tests.* If a plan covers more than 2 percent professional employees, no employees in the plan are treated as covered by a collective bargaining agreement. A plan that covers more than 2 percent professional employees must satisfy section 410(b) without regard to section 413(b) and the special rule in § 1.410(b)–2(b)(7) of this section (regarding collectively bargained plans). In such cases, all nonexcludable employees must be taken into account. For this purpose, employees included in other collective bargaining units are excludable employees. However, the employees who are not covered by a collective bargaining agreement and the employees who are covered by an agreement that has more than 2 percent professionals are not excludable employees.

(iv) *Examples.* The following examples illustrate the collective bargaining unit rules of this section.

Example 1. An employer has 700 collectively bargained employees (none of whom is a professional employee) and 300 noncollectively bargained employees (200 of whom are highly compensated employees). For purposes of applying the ratio percentage test of § 1.410(b)–2(b)(2) to Plan X, which benefits only the 300 noncollectively bargained employees, the 700 collectively bargained employees are treated as excludable employees pursuant to paragraph (d) of this section.

Example 2. (i) An employer has 1,500 employees in the following categories:

	Noncollectively bargained employees	Collectively bargained employees	Total
Highly compensated employees	100	100	200
Nonhighly compensated employees	900	400	1,300
Total	1,000	500	1,500

The employer maintains Plan Y, which benefits 1,100 employees, including all of the noncollectively bargained employees (except for 100 nonhighly compensated employees who are noncollectively bargained employees), and 200 of the collectively bargained employees (including the 100 highly compensated employees who are collectively bargained employees). There are no professional employees covered by the collective bargaining agreement. In accordance with § 1.410(b)–7(c)(5), the employer must apply the ratio percentage test of § 1.410(b)–2(b)(2) to Plan Y as if the plan were two separate plans, one benefiting the noncollectively bargained employees and the other benefiting the collectively bargained employees.

(ii) In testing the portion of Plan Y that benefits the noncollectively bargained employees, the collectively bargained employees are excludable employees. That portion's ratio percentage is 88.89 percent ([800/900] /[100/100] = 88.89%/100% =0.8889), and thus it satisfies the ratio percentage test. The portion of Plan Y that benefits collectively bargained employees automatically satisfies section 410(b) under the special rule in § 1.410(b)–2(b)(7).

(e) *Employees of qualified separate lines of business.* If an employer is treated as operating qualified separate lines of business for purposes of section 410(b) in accordance with section 414(r), in testing a plan that benefits the employees of one qualified separate line of business, the employees of the other qualified separate lines of business of the employer are treated as excludable employees. The rule in this paragraph (e) does not apply for purposes of satisfying the nondiscriminatory classification requirement of section 410(b)(5)(B).

(f) *Certain terminating employees*—(*1*) *In general.* An employee may be treated as an excludable employee for a plan year with respect to a particular plan if—

(i) The employee does not benefit under the plan for the plan year,

(ii) The employee is eligible to participate in the plan,

(iii) The plan has a minimum period of service requirement or a requirement that an employee be employed on the last day of the plan year (last-day requirement) in order for an employee to accrue a benefit or receive an allocation for the plan year,

(iv) The employee fails to accrue a benefit or receive an allocation under the plan solely because of the failure to satisfy the minimum period of service or last-day requirement,

(v) The employee terminates employment during the plan year with no more than 500 hours of service, and the employee is not an employee as of the last day of the plan year (for purposes of this paragraph (f)(1)(v), a plan that uses the elapsed time method of determining years of service may use either 91 consecutive calendar days or 3 consecutive calendar months instead of 500 hours of service, provided it uses the same convention for all employees during a plan year), and

(vi) If this paragraph (f) is applied with respect to any employee with respect to a plan for a plan year, it is applied with respect to all employees with respect to the plan for the plan year.

(*2*) *Hours of service.* For purposes of this paragraph (f), the term "hours of service" has the same meaning as provided for such term by 29 CFR 2530.200b–2 under the general method of crediting service for the employee. If one of the equivalencies set forth in 29 CFR 2530.200b–3 is used for crediting service under the plan, the 500-hour requirement must be adjusted accordingly.

(*3*) *Examples.* The following examples illustrate the provision of this paragraph (f).

Example 1. An employer has 35 employees who are eligible to participate under a defined contribution plan. The plan provides that an employee will not receive an allocation of contributions for a plan year unless the employee is employed by the employer on the last day of the plan year. Only 30 employees are employed by the employer on the last day of the plan year. Two of the five employees who terminated employment before the last day of the plan year had 500 or fewer hours of service during the plan year, and the remaining three had more than 500 hours of service during the year. Of the five employees who were no longer employed on the last day of the plan year, the two with 500 hours of service or less during the plan year are treated as excludable employees for purposes of section 410(b), and the remaining three who had over 500 hours of service during the plan year are taken into account in testing the plan under section 410(b) but are treated as not benefiting under the plan.

Example 2. An employer has 30 employees who are eligible to participate under a defined contribution plan. The plan requires 1,000 hours of service to receive an allocation of contributions or forfeitures. Ten employees do not receive an allocation because of their failure to complete 1,000 hours of service. Three of the 10 employees who failed to satisfy the minimum service requirement completed 500 or fewer hours of service and terminated their employment. Two of the employees completed more than 500, but fewer than 1,000 hours of service and

terminated their employment. The remaining five employees did not terminate employment. Under the rule in paragraph (f) of this section, the three terminated employees who completed 500 or fewer hours of service are treated as excludable employees for the portion of the plan year they are employed. The other seven employees who do not receive an allocation are taken into account in testing the plan under section 410(b) but are treated as not benefiting under the plan.

Example 3. An employer maintains two plans, Plan A for salaried employees and Plan B for hourly employees. Of the 100 salaried employees, two do not receive an allocation under Plan A for the plan year because they terminate employment before completing 500 hours of service. Of the 300 hourly employees, 50 do not receive an allocation under Plan B for the plan year because they terminate employment before completing 500 hours. In applying section 410(b) to Plan A, the two employees who did not receive an allocation under Plan A are excludable employees, but the 50 who did not receive an allocation under Plan B are not excludable employees, because they were not eligible to participate under Plan A.

(g) *Employees of certain governmental or tax-exempt entities precluded from maintaining a section 401(k) plan.* For purposes of testing a section 401(k) plan or a section 401(m) plan that consists solely of employer matching contributions that are tied to elective contributions under a section 401(k) plan, an employer may treat as excludable those employees of governmental or tax-exempt entities who are precluded from being eligible employees under a section 401(k) plan by reason of section 401(k)(4)(B), if more than 95 percent of the employees of the employer who are not precluded from being eligible employees by section 401(k)(4)(B) benefit under the plan for the plan year.

(h) *Former employees*—(1) *In general.* For purposes of applying section 410(b) with respect to former employees, all former employees of the employer are taken into account, except that the employer may treat a former employee described in paragraph (h)(2) or (h)(3) of this section as an excludable former employee. If either (or both) of the former employee exclusion rules under paragraphs (h)(2) and (h)(3) of this section is applied, it must be applied to all former employees for the plan year on a consistent basis.

(2) *Employees terminated before a specified date.* The employer may treat a former employee as excludable if—

(i) The former employee became a former employee either prior to January 1, 1984, or prior to the tenth calendar year preceding the calendar year in which the current plan year begins, and

(ii) The former employee became a former employee in a calendar year that precedes the earliest calendar year in which any former employee who benefits under the plan in the current plan year became a former employee.

(3) *Previously excludable employees.* The employer may treat a former employee as excludable if the former employee was an excludable employee (or would have been an excludable employee if these regulations had been in effect) under the rules of paragraphs (b) through (g) of this section during the plan year in which the former employee became a former employee. If the employer treats a former employee as excludable pursuant to this paragraph (h)(3), the former employee is not taken into account with respect to a plan even if the former employee is benefiting under the plan.

§ 1.410(b)-7 Definition of plan and rules governing plan disaggregation and aggregation.

(a) *In general.* This section provides a definition of "plan." First, this section sets forth a definition of plan within the meaning of section 401(a) or 403(a). Then certain mandatory disaggregation and permissive aggregation rules are applied. The result is the definition of plan that applies for purposes of sections 410(b) and 401(a)(4). Thus, in general, the term "plan" as used in this section initially refers to a plan described in section 414(l) and to an annuity plan described in section 403(a), and the term "plan" as used in other sections under these regulations means the plan determined after application of this section. Paragraph (b) of this section provides that each single plan under section 414(l) is treated as a single plan for purposes of section 410(b). Paragraph (c) of this section describes the rules for certain plans that must be treated as comprising two or more separate plans, each of which is a single plan subject to section 410(b). Paragraph (d) of this section provides a rule permitting an employer to aggregate certain separate plans to form a single plan for purposes of section 410(b). Paragraph (e) of this section provides rules for determining the testing group of plans taken into account in determining whether a plan satisfies the average benefit percentage test of § 1.410(b)-5.

(b) *Separate asset pools are separate plans.* Each single plan within the meaning of section 414(l) is a separate plan for purposes of section 410(b). See § 414(l)-1(b). For example, if only a portion of the assets under a defined benefit plan is available, on an ongoing basis, to provide the benefits of certain employees, and the remaining assets are available only in certain limited cases to provide such benefits (but are available in all cases for the benefit of other employees), there are two separate plans. Similarly, the defined contribution portion of a plan described in section 414(k) is a separate plan from the defined benefit portion of that same plan. A single plan under section 414(l) is a single plan for purposes of section 410(b), even though the plan comprises separate written documents and separate trusts, each of which receives a separate determination letter from the Internal Revenue Service. A defined contribution plan does not comprise separate plans merely because it includes more than one trust, or merely because it provides for separate accounts and permits employees to direct the investment of the amounts allocated to their accounts. Further, a plan does not comprise separate plans merely because assets are separately invested in individual insurance or annuity contracts for employees.

(c) *Mandatory disaggregation of certain plans*—(1) *Section 401(k) and 401(m) plans.* The portion of a plan that is a section 401(k) plan and the portion that is not a section 401(k) plan are treated as separate plans for purposes of section 410(b). Similarly, the portion of a plan that is a section 401(m) plan and the portion that is not a section 401(m) plan are treated as separate plans for purposes of section 410(b). Thus, a plan that consists of elective contributions under a section 401(k) plan, employee and matching contributions under a section 401(m) plan, and contributions other than elective, employee, or matching contributions is treated as three separate plans for purposes of section 410(b). In addition, the portion of a plan that consists of contributions described in § 1.401(k)-1(b)(4)(iv) (i.e., contributions that fail to satisfy the allocation or compensation requirements applicable to elective contributions and are therefore required to be tested separately) and the portion of the plan that does not consist of such contributions are treated as separate plans for purposes of section 410(b).

(2) *ESOPs and non-ESOPs.* The portion of a plan that is an ESOP and the portion of the plan that is not an ESOP are treated as separate plans for purposes of section 410(b), except as otherwise permitted under § 54.4975-11(e) of this Chapter.

(3) *Plans benefiting otherwise excludable employees.* If an employer applies section 410(b) separately to the portion of a plan that benefits only employees who satisfy age and service conditions under the plan that are lower

than the greatest minimum age and service conditions permissible under section 410(a), the plan is treated as comprising separate plans, one benefiting the employees who have satisfied the lower minimum age and service conditions but not the greatest minimum age and service conditions permitted under section 410(a) and one benefiting employees who have satisfied the greatest minimum age and service conditions permitted under section 410(a). See § 410(b)–6(b)(3)(ii) for rules about testing otherwise excludable employees.

(4) *Plans benefiting employees of qualified separate lines of business.* If an employer is treated as operating qualified separate lines of business for purposes of section 410(b) in accordance with section 414(r), the portion of a plan that benefits employees of one qualified separate line of business is treated as a separate plan from the portions of the same plan that benefit employees of the other qualified separate lines of business of the employer. If a plan satisfies the reasonable classification requirement of § 1.410(b)–4(b) before the application of this paragraph (c)(4), then any portion of that plan that is treated as a separate plan as a result of the application of this paragraph (c)(4) is deemed to satisfy that requirement.

(5) *Plans benefiting collectively bargained employees.* The portion of a plan that benefits collectively bargained employees is treated as a separate plan from the portion of the same plan that benefits noncollectively bargained employees. In addition, the portion of a plan that benefits collectively bargained employees covered under one collective bargaining agreement is treated as a separate plan from the portion of the same plan that benefits collectively bargained employees covered another collective bargaining agreement.

(6) *Plans maintained by more than one employer.* If a plan benefits employees of more than one employer, the plan is treated as comprising separate plans each of which is maintained by a separate employer and must satisfy section 410(b) by reference only to such employer's employees.

(d) *Permissive aggregation for ratio percentage and nondiscriminatory classification tests*—(1) *In general.* Except as provided in paragraphs (d)(2) and (d)(3) of this section, for purposes of applying the ratio percentage test of § 1.410(b)–2(b)(2) or the nondiscriminatory classification test of § 1.410(b)–4, an employer may designate two or more separate plans (determined after application of paragraph (b) of this section) as a single plan. If an employer treats two or more separate plans as a single plan under this paragraph, the plans must be treated as a single plan for all purposes under sections 401(a)(4) and 410(b).

(2) *Rules of disaggregation.* An employer may not aggregate portions of a plan that are disaggregated under the rules of paragraph (c) of this section. Similarly, an employer may not aggregate two or more separate plans that would be disaggregated under the rules of paragraph (c) of this section if they were portions of the same plan. In addition, an employer may not aggregate an ESOP with another ESOP, except as permitted under § 54.4975–11(e) of this Chapter.

(3) *Duplicative aggregation.* A plan may not be combined with two or more plans to form more than one single plan. Thus, for example, an employer that maintains plans A, B, and C may not aggregate plans A and B and plans A and C to form two single plans. However, the employer may apply the permissive aggregation rules of this paragraph (d) to form any one (and only one) of the following combinations: plan ABC, plans AB and C, plans AC and B, or plans A and BC.

(4) *Special rule for plans benefiting employees of a qualified separate line of business.* For purposes of paragraph (d)(1) of this section, an employer is permitted to aggregate the portions of two or more plans that benefit employees of the same qualified separate line of business, regardless of whether the employer aggregates the portion of the same plans that benefit employees of the other qualified separate lines of business of the employer. Thus, the employer is permitted to apply paragraph (d)(1) of this section with respect to two or more separate plans determined after the application of paragraphs (b) and (c)(5) of this section. In all other respects, the provisions of this paragraph (d) regarding permissive aggregation apply, including (but not limited to) the disaggregation rules under paragraph (d)(2) of this section (including the mandatory disaggregation rule of paragraph (c)(5) of this section) and the prohibition on duplicative aggregation under paragraph (d)(3) of this section. This paragraph (d)(4) applies only in the case of an employer that is treated as operating qualified separate lines of business for purposes of section 410(b) in accordance with section 414(r).

(5) *Same plan year requirement.* Two or more plans may not be aggregated and treated as a single plan under this paragraph (d) unless they have the same plan year. See § 1.410(b)–10 for a special effective date.

(e) *Determination of plans in testing group for average benefit percentage test*—(1) *In general.* For purposes of applying the average benefits percentage test of § 1.410(b)–5 with respect to a plan, all plans in the testing group must be taken into account. For this purpose, the plans in the testing group are the plan being tested and all other plans of the employer that could be permissively aggregated with that plan under paragraph (d) of this section (determined without regard to paragraph (d)(5) of this section and by applying paragraph (d)(2) of this section without regard to paragraphs (c)(1) through (c)(3) of this section).

(2) *Example.* The following example illustrates the rules of this paragraph (e).

Example. Employer X is treated as operating two qualified separate lines of business for purposes of section 410(b) in accordance with section 414(r), QSLOB1 and QSLOB2. Employer X maintains the following plans:

(a) Plan A, the portion of Employer X's employer-wide section 401(k) plan that benefits all noncollectively bargained employees of QSLOB1,

(b) Plan B, the portion of Employer X's employer-wide section 401(k) plan that benefits all noncollectively bargained employees of QSLOB2,

(c) Plan C, a defined benefit plan that benefits all hourly noncollectively bargained employees of QSLOB1,

(d) Plan D, a defined benefit plan that benefits all collectively bargained employees of QSLOB1,

(e) Plan E, an ESOP that benefits all noncollectively bargained employees of QSLOB1,

(f) Plan F, a profit-sharing plan that benefits all salaried noncollectively bargained employees of QSLOB1.

Assume that Plan F does not satisfy the ratio percentage test of § 1.410(b)–2(b)(2), but does satisfy the nondiscriminatory classification test of § 1.410(b)–4. Therefore, to satisfy section 410(b), Plan F must satisfy the average benefit percentage test of § 1410(b)–5. The plans in the testing group used to determine whether Plan F satisfies the average benefit percentage test of § 1.410(b)–5 are Plans A, C, E, and F.

(f) *Section 403(b) plans.* In determining whether a plan satisfies section 410(b), a plan subject to section 403(b)(12)(A)(i) is disregarded. However, in determining whether a plan subject to section 403(b)(12)(A)(i) satisfied section 410(b), plans that are not subject to section 403(b)(12)(A)(i) may be taken into account.

§ 1.410(b)–8 Additional rules.

(a) *Testing methods*—(1) *In general.* A plan must satisfy section 410(b) for a plan year using one of the testing options in paragraphs (a)(2) through (a)(4) of this section. Whichever testing

option is used for the plan year must also be used for purposes of applying section 401(a)(4) to the plan for the plan year. The annual testing option in paragraph (a)(4) of this section must be used in applying section 410(b) to a section 401(k) plan or a section 401(m) plan, and in applying the average benefit percentage test of § 1.410(b)–5. For purposes of this paragraph (a), the plan provisions and other relevant facts as of the last day of the plan year regarding which employees benefit under the plan for the plan year are applied to the employees taken into account under the testing option used for the plan year. For this purpose, amendments retroactively correcting a plan in accordance with § 1.401(a)(4)–11(g) are taken into account as plan provisions in effect as of the last day of the plan year.

(2) *Daily testing option.* A plan satisfies section 410(b) for a plan year if it satisfies § 1.410(b)–2 on each day of the plan year, taking into account only those employees (or former employees) who are employees (or former employees) on that day.

(3) *Quarterly testing option.* A plan is deemed to satisfy section 410(b) for a plan year if the plan satisfies § 1.410(b)–2 on at least one day in each quarter of the plan year, taking into account for each of those days only those employees (or former employees) who are employees (or former employees) on that day. The preceding sentence does not apply if the plan's eligibility rules or benefit formula operate to cause the four quarterly testing days selected by the employer not to be reasonably representative of the coverage of the plan over the entire plan year.

(4) *Annual testing option.* A plan satisfies section 410(b) for a plan year if it satisfies § 1.410(b)–2 as of the last day of the plan year, taking into account all employees (or former employees) who were employees (or former employees) on any day during the plan year.

(5) *Example.* The following example illustrates this paragraph (a).

Example. Plan A is a defined contribution plan that is not a section 401(k) plan or a section 401(m) plan, and that conditions allocations on an employee's employment on the last day of the plan year. Plan A is being tested for the 1995 calendar plan year using the daily testing option in paragraph (a)(2) of this section. In testing the plan for compliance with section 410(b) on March 11, 1995, Employee X is taken into account because he was an employee on that day and was not an excludable employee with respect to Plan A on that day. Employee X was a participant in Plan A on March 11, 1995, was employed on December 31, 1995, and received an allocation under Plan A for the 1995 plan year. Under these facts, Employee X is treated as benefiting under Plan A on March 11, 1995, even though Employee X had not satisfied all of the conditions for receiving an allocation on that day, because Employee X satisfied all of those conditions as of the last day of the plan year.

(b) *Family member aggregation rule.* For purposes of section 410(b), and in accordance with section 414(q)(6), a highly compensated employee who is a 5-percent owner or one of the ten most highly compensated employees and any family member (or members) of such a highly compensated employee who is also an employee of the employer are to be treated as a single highly compensated employee. If any member of that group is benefiting under a plan, the deemed single employee is treated as benefiting under the plan. If no member of that group is benefiting under a plan, the deemed single employee is treated as not benefiting under the plan.

§ 1.410(b)–9 Definitions.

In applying this section and §§ 1.410(b)–2 through 1.410(b)–10, the definitions in this section govern unless otherwise provided.

Collectively bargained employee. Collectively bargained employee means a collectively bargained employee within the meaning of § 1.410(b)–6(d)(2).

Defined benefit excess plan. Defined benefit excess plan means a defined benefit excess plan as defined in § 1.410(l)–1(c)(16)(i).

Defined benefit plan. Defined benefit plan means a defined benefit plan within the meaning of section 414(j). The portion of a plan described in section 414(k) that does not consist of separate accounts is treated as a defined benefit plan.

Defined contribution plan. Defined contribution plan means a defined contribution plan within the meaning of section 414(i). The portion of a plan described in section 414(k) that consists of separate accounts is treated as a defined contribution plan.

Employee. Employee means an individual who performs services for the employer who is either a common law employee of the employer, a self-employed individual who is treated as an employee pursuant to section 401(c)(1), or a leased employee (not excluded under section 414(n)(5)) who is treated as an employee of the employer-recipient under section 414(n)(2) or 414(o)(2). Individuals that an employer treats as employees under section 414(n) pursuant to the requirements of section 414(o) are considered to be leased employees for purposes of this rule.

Employer. Employer means the employer maintaining the plan and those employers required to be aggregated with the employer under sections 414(b), (c), (m), or (o). An individual who owns the entire interest of an unincorporated trade or business is treated as an employer. Also, a partnership is treated as the employer of each partner and each employee of the partnership.

ESOP. ESOP or *employee stock ownership plan* means an employee stock ownership plan within the meaning of section 4975(e)(7) or a tax credit employee stock ownership plan within the meaning of section 409(a).

Excess benefit percentage. Excess benefit percentage means excess benefit percentage as defined in § 1.401(l)–1(c)(14).

Former employee. Former employee means an individual who was an employee but has ceased performing services for the employer. An individual is treated as a former employee beginning on the day after the day on which the individual ceases performing services for the employer. Thus, an individual who ceases performing services for an employer during a plan year is both an employee and a former employee for the plan year. Notwithstanding the foregoing, an individual is an employee (and not a former employee) even if the individual is not performing services for the employer during a period for which the plan credits the individual with imputed compensation that satisfies § 1.414(s)–1(e)(3) or imputed service that satisfies § 1.401(a)(4)–11(d)(2).

Gross benefit percentage. Gross benefit percentage means gross benefit percentage as defined in § 1.401(l)–1(c)(18).

Highly compensated employee. Highly compensated employee means a highly compensated employee within the meaning of section 414(q).

Highly compensated former employee. Highly compensated former employee means a highly compensated former employee within the meaning of section 414(q)(9).

Multiemployer plan. Multiemployer plan means a multiemployer plan within the meaning of section 414(f).

Noncollectively bargained employee. Noncollectively bargained employee means an employee who is not a collectively bargained employee.

Nonhighly compensated employee. Nonhighly compensated employee an employee who is not a highly compensated employee.

Nonhighly compensated former employee. Nonhighly compensated former employee means a former employee who is not a highly compensated former employee.

Offset plan. Offset plan means an offset plan as defined in § 1.401(l)–1(c)(24).

Plan year. Plan year means the plan year of the plan as defined in the written plan document. In the absence of a specifically designated plan year, the plan year is deemed to be the calendar year.

Plan year compensation. Plan year compensation means plan year compensation within the meaning of § 1.401(a)(4)–12.

Professional employee. Professional employee means any highly compensated employee who, on any day of the plan year, performs professional services for the employer as an actuary, architect, attorney, chiropodist, chiropractor, dentist, engineer, executive, investment banker, medical doctor, optometrist, osteopath, podiatrist, psychologist, certified or other public accountant, stockbroker, or veterinarian, or in any other professional capacity determined by the Commissioner in a notice or other document of general applicability to constitute the performance of services as a professional.

Ratio percentage. With respect to a plan for a plan year, a plan's *ratio percentage* means the percentage (rounded to the nearest hundredth of a percentage point) determined by dividing the percentage of the nonhighly compensated employees who benefit under the plan by the percentage of the highly compensated employees who benefit under the plan. The percentage of the nonhighly compensated employees who benefit under the plan is determined by dividing the number of nonhighly compensated employees benefiting under the plan by the total number of nonhighly compensated employees of the employer. The percentage of the highly compensated employees who benefit under the plan is determined by dividing the number of highly compensated employees benefiting under the plan by the total number of highly compensated employees of the employer.

Section 401(k) plan. Section 401(k) plan means a plan consisting of elective contributions described in § 1.40(k)–1(g)(3) under a qualified cash or deferred arrangement described in § 1.401(k)–(a)(4)(i). Thus, a section 401(k) plan does not include a plan (or portion of a plan) that consists of contributions under a nonqualified cash or deferred arrangement, or qualified nonelective or qualified matching contributions treated as elective contributions under § 1.401(k)–1(b)(5).

Section 401(l) plan. Section 401(l) plan means a plan that—

(1) Provides for a disparity in employer-provided benefits or contributions that satisfies section 401(l) in form, and

(2) Relies on one of the safe harbors of § 1.401(a)(4)–2(b)(3), 1.401(a)(4)–3(b), 1.401(a)(4)–8(b)(3), or 1.401(a)(4)–8(c)(3)(iii)(B) to satisfy section 401(a)(4).

Section 401(m) plan. Section 401(m) plan means a plan consisting of employee contributions described in § 1.401(m)–1(f)(6) or matching contributions described in § 1.40(m)–1(f)(12), or both. Thus, a section 401(m) plan does not include a plan (or portion of a plan) that consists of elective contributions or qualified nonelective contributions treated as matching contributions under § 1.401(m)–1(b)(5).

§ 1.410(b)–10 Effective dates and transition rules.

(a) *General rule.* The minimum coverage rules of section 410(b), as amended by section 1112 of the Tax Reform Act of 1986, and §§ 1.410(b)–2 through 1.410(b)–9, other than § 1.410(b)–5, apply to plan years beginning on or after January 1, 1989. See paragraph (b)(2) of this section for the effective date of § 1.410(b)–5. Notwithstanding the first sentence of this paragraph (a) and § 54.4975–11(a)(5) of this Chapter, an employer may treat the rule in § 1.410(b)–7(c)(2), regarding mandatory disaggregation of ESOPs and non-ESOPs, as not effective for plan years beginning before January 1, 1990, except for purposes of the rule in § 1.410(b)–7(d)(2) prohibiting aggregation of two or more separate plans that would be disaggregated under the rules of § 1.410(b)–7(c) if they were portions of the same plan.

(b) *Transition rules*—(1) *Nondiscriminatory classification test.* Notwithstanding paragraph (a) of this section, in applying the average benefit test for any plan year beginning after December 31, 1988, and before January 1, 1990 (the "1989 plan year"), whether or not a plan's classification is nondiscriminatory may be determined either by applying the rules in § 1.410(b)–4 or solely on the basis of facts and circumstances, at the employer's election. If a plan's classification has been determined by the Commissioner to be nondiscriminatory, and there have been no significant changes in, or omissions of, a material fact, the classification will be treated as nondiscriminatory for the 1989 plan year.

(2) *Average benefit percentage test.* Section 1.410(b)–5 applies to plan years beginning on or after January 1, 1992. For plan years beginning before that date and on or after the first day of the first plan year to which the amendments made to section 410(b) by section 1112(a) of the Tax Reform Act of 1986 apply, a plan must be operated in accordance with a reasonable, good faith interpretation of sections 410(b)(2)(A)(ii) and 410(b)(2)(B) through (E). Whether a plan is operated in accordance with a reasonable, good faith interpretation of sections 410(A)(ii) and 410(b)(2)(b)(2)(B) through (E) will generally be determined based on all relevant facts and circumstances, including the extent to which an employer has resolved unclear issues in its favor. A plan will be deemed to be operated in accordance with a reasonable, good faith interpretation of sections 410(b)(2)(A)(ii) and 410(b)(2)(B) through (E) if it is operated in accordance with the terms of § 1.410(b)–5.

(c) *Employees who benefit under a plan.* Notwithstanding paragraph (a) of this section, for the first plan year beginning after December 31, 1988, and before January 1, 1990, any employee who is eligible to participate under the plan and who fails to accrue a benefit solely because of the failure to satisfy either a minimum-period-of-service requirement of 1,000 hours of service or less or a last-day-of-the-plan-year requirement may be treated as benefiting under the plan, provided that all such employees are treated as benefiting under the plan.

(d) *Aggregation of two or more plans.* Notwithstanding paragraph (a) of this section, an employer may treat the rule of § 1.410(b)–7(d)(5) (requiring plans permissively aggregated under § 1.410(b)–7(d) to have the same plan years) as not effective for plan years beginning before January 1, 1990.

(e) *Special rule for collective bargaining agreements*—(1) *In general.* In the case of a plan maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers ratified before March 1, 1986, the minimum coverage rules of section 410(b), as amended by section 1112 of the Tax Reform Act of 1986, and §§ 1.410(b)–2 through 1.410(b)–9 do not apply to employees covered by any such agreement in plan years beginning before the earlier of—

(i) January 1, 1991, or

(ii) The later of January 1, 1989, or the date on which the last of such collective bargaining agreements terminates (determined without regard to any extension thereof after February 28, 1986). For purposes of this paragraph (e)(1)(ii), any extension or renegotiation of a collective bargaining agreement,

which extension or renegotiation is ratified after February 28, 1986, is to be disregarded in determining the date on which the agreement terminates.

(2) *Example.* The following example illustrates this paragraph (e).

Example. Employer A maintains Plan 1 pursuant to a collective bargaining agreement. Plan 1 covers 100 of Employer A's noncollectively bargained employees and 900 of Employer A's collectively bargained employees. Employer A also maintains Plan 2, which covers Employer A's other 400 noncollectively bargained employees. The collective bargaining agreement under which Plan 1 is maintained was entered into on January 1, 1986, and expires December 31, 1992. Because Plan 1 is a plan maintained pursuant to a collective bargaining agreement, section 410(b) applies to the first plan year beginning on or after January 1, 1991. In applying section 410(b) to Plan 2, the 100 noncollectively bargained employees in Plan 1 must be taken into account. The deferred effective date for plans maintained pursuant to a collective bargaining agreement is not applicable in determining how section 410(b) is applied to a plan that is not maintained pursuant to a collective bargaining agreement.

(3) *Plan maintained pursuant to a collective bargaining agreement.* For purposes of this paragraph (e), a plan is maintained pursuant to one or more collective bargaining agreements between employee representatives and one or more employers, if one or more of the agreements were ratified before March 1, 1986. Only plans maintained pursuant to agreements that the Secretary of Labor finds to be collective bargaining agreements and that satisfy section 7701(a)(46) are eligible for the deferred effective date under this paragraph (e). A plan will not be treated as a plan maintained pursuant to one or more collective bargaining agreements eligible for the deferred effective date under this paragraph (e) unless the plan would be a plan maintained pursuant to one or more collective bargaining agreements under the principles applied under section 1017(c) of the Employee Retirement Income Security Act of 1974. See H.R. Rep. No. 1280, 93rd Cong. 2d Sess. 266 (1974).

Fred T. Goldberg, Jr.,

Commissioner of Internal Revenue.

Approved: August 30, 1991.

Kenneth W. Gideon,

Assistant Secretary of the Treasury.

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26 CFR Part 1

[T.D. 8361]

RIN 1545-AO66

Definition of Compensation for Qualified Plans

AGENCY: Internal Revenue Service, Treasury.

ACTION: Final regulations.

SUMMARY: This document contains final regulations relating to the scope and meaning of the term "compensation" for tax-qualified retirement plans under section 414(s) of the Internal Revenue Code of 1986. These regulations reflect changes made by the Tax Reform Act of 1986 and the Technical and Miscellaneous Revenue Act of 1988. These regulations provide guidance necessary to comply with the law and affect sponsors of, and participants in, tax-qualified retirement plans.

EFFECTIVE DATE: These regulations are effective for plan years beginning on or after January 1, 1987, and are applied to those plan years except as set forth in § 1.414(s)–(1(i).

FOR FURTHER INFORMATION CONTACT: David Fuller at 202–377–9372 (not a toll-free number).

SUPPLEMENTARY INFORMATION: On May 14, 1990, the Internal Revenue Service published temporary regulations relating to the scope and meaning of the term "compensation" under sections 414(s) and 415(c)(3) of the Internal Revenue Code (Code) in the **Federal Register** (55 FR 19875). Those regulations provided guidance concerning the definition of compensation and conformed the regulations to section 1115 of the Tax Reform Act of 1986 and section 1011(j)(1) of the Technical and Miscellaneous Revenue Act of 1988. The text of those temporary regulations served as the comment document for a notice of proposed rulemaking also published in the **Federal Register** May 14, 1990 (55 FR 19945).

Written comments were received from the public on the proposed regulations. In addition, on September 26, 27, and 28, 1990, a public hearing was held concerning the regulations. After consideration of all of the written comments received and the statements made at the public hearing, the proposed and temporary regulations are adopted as modified by this Treasury Decision.

Background

Section 414(s) and these regulations provide rules for defining compensation for purposes of applying any provision that specifically refers to section 414(s). For example, section 414(s) is explicitly referred to in many of the nondiscrimination provisions applicable to pension, profit-sharing, and stock bonus plans qualified under section 401(a). The amount of plan benefits or contributions, expressed as a percentage of compensation within the meaning of section 414(s), is generally one of the key factors in determining whether these nondiscrimination provisions are satisfied.

The temporary regulations implemented the section 414(s) definition of compensation by providing design-based safe harbor definitions of compensation under section 415(c)(3) and a design-based safe harbor alternative definition under section 414(s). In addition, the temporary regulations generally provided that any other reasonable definition of compensation would satisfy section 414(s) if the definition did not by design favor highly compensated employees and satisfied a nondiscrimination requirement. Finally, the temporary regulations provided rules that permitted compensation to include elective salary reduction contributions specified in section 414(s)(2), section 457 deferred compensation, and section 414(h) employer pick-up amounts.

Overview of Development of Final Regulations

The Department of the Treasury and the Internal Revenue Service have received a number of comments on the proposed and temporary regulations under section 414(s) and the regulations under the related Code sections with which the section 414(s) regulations were published (in particular, sections 401(a)(4), 401(l), and 410(b)). This Treasury Decision reflects consideration of all of the comments received. In general, the final regulations retain the approach taken in the temporary regulations. In response to comments, revisions have been made to increase the utility of the design-based safe harbors, to increase the flexibility of the rules permitting reasonable nondiscriminatory definitions, and to simplify and clarify certain aspects of the temporary regulations.

Compensation Safe Harbors Under Section 415(c)(3) Applicable For Purposes Of Section 414(s)

1. 415(c)(3) Safe Harbor Definitions

The temporary regulations under section 414(s) provided that definitions of compensation that satisfied section 415(c)(3) also would constitute safe harbor definitions of compensation for purposes of section 414(s). The

temporary regulations also clarified the regulations under section 415(c)(3) as to what amounts were included in compensation. In addition, the temporary regulations added two new section 415(c)(3) safe harbors generally based on wages as defined for FICA tax purposes and on wages as defined for income tax withholding purposes.

Commentators generally favored the addition of a safe harbor definition based on wages for purposes of income tax withholding. This safe harbor definition is retained without modification in the final regulations.

In contrast, many commentators found the new safe harbor definition based on FICA wages to be of limited utility from an administrative point of view. In addition, comments indicated that the use of FICA wages as an alternative compensation definition under section 415(c)(3) was being misinterpreted and misapplied. Moreover, commentators pointed out that often the data was not readily accessible because many employers do not keep a separate accounting of FICA wages after an employee's wages exceed the taxable wage base limitation.

A number of commentators requested a safe harbor definition based on wages reported in Box 10 on Form W–2, Wage and Tax Statement (Box 10 Compensation), indicating that it would be a useful safe harbor definition of compensation. Box 10 Compensation does not precisely match either FICA wages or wages for income tax withholding purposes since it includes items that are not "wages" under either definition. However, the commentators noted that for many employers this is the most accessible individual employee compensation amount retained in their data bases.

In response to these comments and to further administrability, the final regulations eliminate the section 415(c)(3) safe harbor definition of compensation based on FICA wages and replace it with a new safe harbor definition for compensation required to be reported under sections 6041 and 6051. The safe harbor definition is intended to be a safe harbor for Box 10 Compensation. Employers may assume that, as long as the instructions to the Form W–2 concerning the amount to report in Box 10 remain the same as they are for the 1990 or 1991 Form W–2, the amount reported in Box 10 for any employee satisfies this safe harbor. In addition, the final regulations permit employers to adjust the Box 10 compensation amount by excluding moving expense reimbursements if it is reasonable to believe that a corresponding deduction is allowable under section 217.

2. Residents of Certain U.S. Possessions

Sections 931 and 933 provide that the gross income of residents of American Samoa, Guam, the Northern Mariana Islands, or Puerto Rico does not include income derived from sources within these specified possessions or Puerto Rico, respectively. The temporary regulations under section 415(c)(3) provided that an item or amount is only compensation to the extent that it is includible in gross income. The final regulations clarify that the exclusions from gross income under sections 931 and 933 are disregarded for purposes of determining whether income from any of the specified possessions or Puerto Rico is compensation under section 415(c)(3). The final regulations also provide that similar principles are to be applied in determining compensation of self-employed individuals who are residents of specified possessions or Puerto Rico.

Compensation Under Section 414(s)

1. Definition of Compensation That Satisfy Section 414(s)

Under section 414(s)(3), the Secretary is granted authority to prescribe alternative definitions of compensation by regulation. Section 1.414(s)–1(c)(3) of the temporary regulations exercised that authority by prescribing a safe harbor alternative definition of compensation that automatically satisfies section 414(s). Under the safe harbor alternative definition, an employer may generally define compensation as including regular or base salary or wages, plus commissions, tips, overtime and other premium pay, and bonuses, and excluding all of the items specified in the regulation for this purpose (even if includible in gross income). These specified exclusions are reimbursements or other expense allowances, fringe benefits (whether cash or noncash), moving expenses, deferred compensation, and welfare benefits.

This safe harbor definition is retained in the final regulations. The final regulations also retain the rule permitting an employer to elect to modify a section 415(c)(3) definition or the safe harbor alternative definition to include the amount of certain elective contributions, section 457 deferred compensation, and section 414(h) employer pickup amounts, provided that all these amounts are included.

Commentators asked that the safe harbor alternative definition be expanded to allow additional items to be excluded from the compensation of highly compensated employees. The final regulations amplify the temporary regulations by permitting an employer to modify any of the safe harbor definitions to permit additional items or amounts of compensation to be excluded on a uniform and consistent basis from the compensation of highly compensated employees, but not from the compensation of any nonhighly compensated employees. This modification is permitted to be made after the inclusion of elective contributions and deferred compensation. Thus, for example, a definition of compensation under section 415(c)(3) could be first modified to include all elective contributions, section 457 deferred compensation, and employer pick-up amounts, but then be further modified to exclude section 457 deferred compensation on a uniform consistent basis from the compensation of highly compensated employees.

2. Reasonable Definition of Compensation

In addition to the safe harbor alternative definition, the temporary regulations provided that any other alternative definition of compensation would satisfy section 414(s) if the definition was reasonable, did not by design favor highly compensated employees, and satisfied a nondiscrimination requirement. This flexible approach was intended to accommodate employers' legitimate business needs while retaining the basic statutory requirement that the compensation definition must be nondiscriminatory. Comments on this approach were generally favorable, and, therefore, the final regulations retain this general rule. Commentators also asked for clarification on certain aspects of the rule. Thus, final regulations provide further guidance on circumstances under which a definition is not reasonable. For example, under the final regulations, a definition of compensation is not reasonable if the definition includes an item or amount not includible under a safe harbor definition (e.g., business expenses substantiated to the payor under an accountable plan). In addition, a definition is not reasonable if it provides that each employee's compensation is a specified portion of the employee's total compensation (such as 90 percent) measured for the otherwise applicable determination period.

3. Use of Rate-of-Pay Definition for Purposes of Section 414(s)

Commentators indicated that many plans use a rate-of-pay definition of compensation under the plan benefit

formula and requested that the regulations permit use of a rate-of-pay definition as an alternative definition under section 414(s). Often an employer uses rate of pay in the benefit formula because it reduces data collection, is predictable, and is easily administered. The proposed regulations under section 401(a)(4) and the temporary regulations under section 414(s) did not preclude employers from retaining a rate-of-pay definition of compensation for purposes of applying the plan formula. However, a plan using a rate-of-pay benefit formula would have been required to use a different definition of compensation in testing for compliance with the nondiscrimination rules and could not have satisfied the nondiscrimination rules on a safe harbor basis.

Rate of pay as an alternative section 414(s) definition of compensation was not included in the temporary regulations because rate of pay is a projected figure, rather than a reflection of actual compensation. Thus, it appeared to be inconsistent with the underlying purpose of the definition of compensation under section 414(s). Nevertheless, the Treasury and the Service recognize that use of a rate-of-pay formula by a plan facilitates plan administration and may, in fact, be reasonable and nondiscriminatory under specified conditions. Consequently, the final regulation permit rate of pay (referred to as rate of compensation in the regulations) as an alternative definition under section 414(s). However, to limit possible distortions, if rate-of-pay compensation is used for purposes of section 414(s), amounts based on the employee's rate of pay can only be credited under the formula for 30 days after an employee terminates employment (or is otherwise absent without pay). Of course, as with any section 414(s) definition of compensation other than one included in a safe harbor, the definition must be nondiscriminatory. By permitting rate of pay as an alternative section 414(s) definition of compensation, plans using a rate-of-pay benefit formula may be able to satisfy section 401(a)(4) on a safe harbor basis.

4. Crediting Compensation During Leaves of Absence

Commentators suggested that the permissible definitions of compensation under section 414(s) should allow crediting of compensation while an employee is on leave of absence in order to permit continued accruals under the plan. During the interim between the temporary regulations and the final regulations, attention was focused on this issue as a result of the Persian Gulf conflict. Specifically, employers asked whether compensation credited to reservists under employee benefit plans while on leave of absence due to active military duty would satisfy section 414(s) as a reasonable definition of compensation.

In responses to these comments, the final regulations provide that compensation credited for benefit accrual purposes during an unpaid absence from service for a reason other than termination from employment can satisfy section 414(s). Under the final regulations, compensation may be credited indefinitely for absence from service due to military duty or jury duty. In addition to absence from service for military duty and jury duty, the final regulations also permit compensation to be deemed to continue under this rule for other unpaid absence from service for a period not to exceed 6 months. No similar rule was necessary for absence from service due to long-term disability because any benefit based on deemed compensation credited during a disability period generally gives rise to a qualified disability benefit and thus is not included in nondiscrimination testing of benefit amounts. See section 411(a)(9)(B).

The regulations impose certain restrictions on the compensation that may be credited during absence from service for purposes of section 414(s) in order to ensure that the method used is nondiscriminatory. Specifically, the final regulations required that the compensation credited not exceed the compensation that would have been credited under the plan if services had continued (e.g., actual compensation at the time the leave of absence began or the rate of pay in effect while the employee is absent from service that is applicable to the employee's specific job grade). In addition, the final regulations require that any provisions in the plan for crediting compensation must be applied uniformly to all similarly situated employees and that the provisions for crediting compensation satisfy the effective availability requirements under section 401(a)(4). See § 1.401(a)(4)–4(c).

5. Nondiscrimination Requirement

The final regulations, like the temporary regulations, provide that an alternative definition of compensation is nondiscriminatory under section 414(s) if the average percentage of total compensation included under the alternative definition for an employer's highly compensated employees as a group does not exceed by more than a de minimis amount the average percentage of total compensation included under the alternative definition for the employer's nonhighly compensated employees as a group. The preamble to the temporary regulations stated that any reasonable method could be used for this purpose. Several commentators suggested that the final regulations should provide more guidance on appropriate methodologies for determining the average percentage for each group.

The final regulations continue to provide that any reasonable method may be used in determining the average percentages of total compensation included under the alternative definitions for the highly compensated employee group and the nonhighly compensated employee group, respectively. However, the final regulations also include a specific averaging calculation method that is treated as satisfying the reasonableness requirement. Under this method, an individual compensation percentage is calculated for each employee in the highly compensated employee group and in the nonhighly compensated employee group. An employee's compensation percentage is calculated by dividing the amount of the employee's compensation that is included in the alternative definition by the amount of the employee's total compensation. These individual compensation percentages are then averaged within the highly compensated and nonhighly compensated groups producing an average for each group. Any other reasonable method may be utilized to calculate the average-compensation percentages for either group provided the average percentage produced by the method is not reasonably expected to very significantly from the average percentage using the individual-percentage method. Recognizing the factors that create a significant variance in the calculation of the average percentage may not be the same for both groups, the final regulations do not require that the same method must be used to calculate the average percentage for each group.

In the case of a rate-of-pay definition of compensation or a definition of compensation that credits compensation during absence from service, the nondiscrimination requirement is modified to prevent distortions in the average percentage of total compensation included under the alternative definition for the highly compensated employee group and the nonhighly compensated employee group. A distortion may result if the imputed compensation credited to some

employees for a year under the alternative definition exceeds actual compensation for those employees for the year. Therefore, the final regulations provide that, in the case of these definitions of compensation, solely for purposes of calculating the average percentages used in applying the nondiscrimination test, the compensation included for an employee under the alternative definition may not exceed the employee's total compensation.

6. Employees Taken Into Account for Nondiscrimination Purposes

The final regulations, like the temporary regulations, provide that the employees taken into account in determining whether a compensation definition is nondiscriminatory are the same employees taken into account in satisfying the applicable statutory provision. However, the temporary regulations permitted the nondiscrimination requirement to be satisfied taking into account all the nonexcludable employees of an employer unless use of that method could reasonably be expected to result in a distortion of the percentage that was more than de minimis given the compensation characteristics of the employer's work force. Concerns were raised that employers were reluctant to use this rule because of uncertainty as to whether their facts met the applicable standard. Thus, the rule has been modified to permit employers to take into account all employees in all plans of the employer for which the alternative definition is being used to determine whether the plan satisfies section 401(a)(4) for the plan year.

7. Availability of Elective, Employee, and Matching Contributions

The temporary regulations contained a rule providing that, for the limited purposes of applying the nondiscriminatory availability requirements of the proposed regulations with respect to elective, employee, and matching contributions, any reasonable definition of compensation was treated as nondiscriminatory. This rule was deleted from the final regulations because the final section 401(k) and 401(m) regulations published in the **Federal Register** on August 15, 1991, and the final section 401(a)(4) regulations issued simultaneously with this regulation, clarify the application of the nondiscriminatory availability requirement under section 401(a)(4) to arrangements subject to sections 401(k) and 401(m), and make this rule unnecessary. See § 1.401(k)-1(a)(4)(iv) and § 1.401(m)-1(a)(2). Under these rules, employee, elective, and matching contributions are not required to be based on compensation determined under a definition that satisfies section 414(s). Rather, use of different definitions of compensation for purposes of the right to employee, elective, and matching contributions are treated as different benefits, rights, and features, each of which must separately satisfy the nondiscriminatory availability requirement of § 1.401(a)(4)-4. In addition, employee, elective, and matching contributions that use a definition of compensation that has the effect of restricting access by nonhighly compensated employees may not satisfy the nondiscriminatory availability requirement of the final section 401(a)(4) regulations, even where the same definition of compensation is used for all employees.

Effective Date

These regulations are effective for plan years beginning on or after January 1, 1987, except as set forth in § 1.414(s)-1(i).

Special Analyses

It has been determined that these rules are not major rules as defined in Executive Order 12291. Therefore, a Regulatory Impact Analysis is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) and the Regulatory Flexibility Act (5 U.S.C. chapter 6) do not apply to these regulations and, therefore, a final Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the notice of proposed rulemaking for the regulations was submitted to the Administrator of the Small Business Administration for comment on their impact on small business.

Drafting Information

The principal authors of these regulations are Marjorie Hoffman and David Fuller of the Office of the Assistant Chief Counsel (Employee Benefits and Exempt Organizations), Internal Revenue Service. However, personnel from other offices of the Service and Treasury Department participated in their development.

List of Subjects in 26 CFR 1.401-0 through 1.419A-2T

Bonds, Employee benefit plans, Income taxes, Pensions, Reporting and recordkeeping requirements, Securities, Trusts and trustees.

Adoption of Amendments to the Regulations

Accordingly, 26 CFR part 1 is amended as follows:

PART 1—INCOME TAX; TAXABLE YEARS BEGINNING AFTER DECEMBER 31, 1953

Paragraph 1. The authority citation for part 1 is amended by removing the citation for § 1.414(s)-1T and adding the following citation to read as follows:

Authority: Sec. 7805, 68A Stat. 917; 26 U.S.C. 7805. * * * § 1.414(s)-1 also issued under 26 U.S.C. 414(s). * * *

Par. 2. New § 1.414(s)-1 is added to read as follows:

§ 1.414(s)-1 Definition of compensation.

(a) *Introduction*—(1) *In general.* Section 414(s) and this section provide rules for defining compensation for purposes of applying any provision that specifically refers to section 414(s) or this section. For example, section 414(s) is referred to in many of the nondiscrimination provisions applicable to pension, profit-sharing, and stock bonus plans qualified under section 401(a). In accordance with section 414(s)(1), this section defines compensation as compensation within the meaning of section 415(c)(3). It also implements the election provided in section 414(s)(2) to treat certain deferrals as compensation and exercises the authority granted to the Secretary in section 414(s)(3) to prescribe alternative nondiscriminatory definitions of compensation.

(2) *Limitations on scope of section 414(s).* Section 414(s) and this section do not apply unless a provision specifically refers to section 414(s) or this section. For example, even though a definition of compensation permitted under section 414(s) must be used in determining whether the contributions or benefits under a pension, profit sharing, or stock bonus plan satisfy a certain applicable provision (such as section 401(a)(4)), except as otherwise specified, the plan is not required to use a definition of compensation that satisfies section 414(s) in calculating the amount of contributions or benefits actually provided under the plan.

(3) *Overview.* Paragraph (b) of this section provides rules of general application that govern a definition of compensation that satisfies section 414(s). Paragraph (c) of this section contains specific definitions of compensation that satisfy section 414(s) without satisfying any additional nondiscrimination requirement under section 414(s). Paragraph (d) of this

section provides rules permitting the use of alternative definitions of compensation that satisfy section 414(s) as long as the nondiscrimination requirement and other requirements described in paragraph (d) of this section are satisfied. Paragraph (e) of this section provides special rules permitting, under certain limited circumstances, the use of imputed compensation rather than actual compensation under a definition of compensation that satisfies section 414(s). Paragraph (f) of this section provides other special rules, including a special rule for determining the compensation of a self-employed individual under an alternate definition of compensation. Paragraph (g) of this section provides definitions for certain terms used in this section.

(b) *Rules of general application*—(1) *Use of a definition.* Any definition of compensation that satisfies section 414(s) may be used when a provision explicitly refers to section 414(s) unless the reference or this section specifically indicates otherwise.

(2) *Consistency rule.* A definition of compensation selected by an employer for use in satisfying an applicable provision must be used consistently to define the compensation of all employees taken into account in satisfying the requirements of the applicable provision for the determination period. For example, although any definition of compensation that satisfies section 414(s) may be used for section 401(a)(4) purposes, the same definition of compensation generally must be used consistently to define the compensation of all employees taken into account in determining whether a plan satisfies section 401(a)(4). Furthermore, a different definition of compensation that satisfies section 414(s) is permitted to be used to determine whether another plan maintained by the same employer separately satisfies the requirements of section 401(a)(4). Although a definition of compensation must be used consistently, an employer may change its definition of compensation for a subsequent determination period with respect to the applicable provision. Rules provided under any applicable provision may modify the consistency requirements of this paragraph (b)(2).

(3) *Self-employed individuals.* Notwithstanding paragraph (b)(1) of this section, self-employed individuals' compensation can only be determined under paragraph (c)(2) of this section (with or without the modification permitted by paragraph (c)(4) of this section) or by using an equivalent alternative compensation amount determined in accordance with paragraph (f)(1) of this section. These limitations on self-employed individuals do not affect their common-law employees. Thus, the compensation of common-law employees of a partnership or sole proprietorship may be defined using an alternative definition, provided the definition otherwise satisfies paragraph (c)(3), (d), or (e) of this section. If an alternative definition of compensation under paragraph (c)(3), (d), or (e) of this section is used for other employees to satisfy an applicable provision, the consistency requirement is only met if paragraph (f) of this section is used for the self-employed individuals.

(c) *Specific definitions of compensation that satisfy section 414(s)*—(1) *General rules.* The definitions of compensation provided in paragraphs (c)(2) and (c)(3) of this section satisfy section 414(s) and need not satisfy any additional requirements under section 414(s). Paragraph (c)(2) of this section describes definitions of compensation within the meaning of section 415(c)(3). Paragraph (c)(3) of this section provides a safe harbor alternative definition that excludes certain additional items of compensation. Paragraph (c)(4) of this section permits any definition provided in paragraph (c)(2) or (c)(3) of this section to include certain types of elective contributions and deferred compensation. Paragraph (c)(5) of this section permits certain modifications to a definition otherwise provided under this paragraph (c).

(2) *Compensation within the meaning of section 415(c)(3).* A definition of compensation that includes all compensation within the meaning of section 415(c)(3) and excludes all other compensation satisfies section 414(s). Sections 1.415–2(d)(2) and (d)(3) provide rules for determining items of compensation included in and excluded from compensation within the meaning of section 415(c)(3). In addition, section 414(s) is satisfied by the safe harbor definitions provided in § 1.415–2(d)(10) and (d)(11) and any additional definitions of compensation prescribed by the Commissioner under the authority provided in § 1.415–2(d)(13) that are treated as satisfying section 415(c)(3).

(3) *Safe harbor alternative definition.* Under the safe harbor alternative definition in this paragraph (c)(3), compensation is compensation as defined in paragraph (c)(2) of this section, reduced by all of the following items (even if includible in gross income): reimbursements or other expense allowances, fringe benefits (cash and noncash), moving expenses, deferred compensation, and welfare benefits.

(4) *Inclusion of certain deferrals in compensation.* Any definition of compensation provided in paragraph (c)(2) or (c)(3) of this section satisfies section 414(s) even though it is modified to include all of the following types of elective contributions and all of the following types of deferred compensation—

(i) Elective contributions that are made by the employer on behalf of its employees that are not includible in gross income under section 125, section 402(a)(8), section 402(h), and section 403(b);

(ii) Compensation deferred under an eligible deferred compensation plan within the meaning of section 457(b) (deferred compensation plans of state and local governments and tax-exempt organizations); and

(iii) Employee contributions (under governmental plans) described in section 414(h)(2) that are picked up by the employing unit and thus are treated as employer contributions.

(5) *Exclusions applicable solely to highly compensated employees.* Any definition of compensation that satisfies paragraph (c)(2) or (c)(3) of this section, with or without the modification permitted by paragraph (c)(4) of this section, may be modified to provide for exclusion of additional items or amounts (including, for example, any one or more of the types of elective contributions or deferred compensation described in paragraph (c)(4) of this section) on a uniform basis from the compensation of the employer's highly compensated employees. This paragraph (c)(5) only permits modifications that apply to the compensation of highly compensated employees. See paragraph (d) of this section for requirements with respect to any modifications in defining the compensation of nonhighly compensated employees.

(d) *Alternative definitions of compensation that satisfy section 414(s)*—(1) *General rule.* In addition to the definitions provided in paragraph (c) of this section, any definition of compensation satisfies section 414(s) with respect to employees (other than self-employed individuals treated as employees under section 401(c)(1)) if the definition of compensation does not by design favor highly compensated employees, is reasonable within the meaning of paragraph (d)(2) of this section, and satisfies the

nondiscrimination requirement in paragraph (d)(3) of this section.

(2) *Reasonable definition of compensation*—(i) *General rule.* An alternative definition of compensation under this paragraph (d) is reasonable under section 414(s) if it is a definition of compensation provided in paragraph (c) of this section, modified to exclude any one or more of the types of compensation as permitted in paragraph (d)(2)(ii) of this section. See paragraph (e) of this section, however, for certain definitions of compensation that include amounts of imputed compensation that are not includible under any definition of compensation provided in paragraph (c) of this section.

(ii) *Items that may be excluded.* Subject to the applicable facts and circumstances, a reasonable definition of compensation is permitted, on a consistent basis, to exclude certain types of irregular or additional compensation, including (but not limited to) one or more of the following: any type of additional compensation for employees working outside their regularly scheduled tour of duty (such as overtime pay, premiums for shift differential, and call-in premiums); bonuses; or any one of the types of compensation excluded under the safe harbor alternative definition in paragraph (c)(3) of this section. A reasonable definition is also permitted to include, on a consistent basis, some, without being required to include all, of the types of elective contributions or deferred compensation described in paragraph (c)(4) of this section.

(iii) *Limits on the amount excluded from compensation.* A definition of compensation is not reasonable if it provides that each employee's compensation is a specified portion of the employee's compensation measured for the otherwise applicable determination period under another definition. For example, a definition of compensation that specifically limits each employee's compensation for a determination period to 95 percent of the employee's compensation using a definition provided in paragraph (c) of this section is not reasonable. Similarly, a definition of compensation that limits each employee's compensation used to satisfy an applicable provision with a 12-month determination period to compensation under a definition provided in paragraph (c) of this section for one month is not a reasonable definition of compensation. However, a definition of compensation is not unreasonable merely because it excludes all compensation in excess of a specified dollar amount.

(3) *Nondiscrimination requirement*—(i) *In general.* An alternative definition of compensation under this paragraph (d) is nondiscriminatory under section 414(s) for a determination period if the average percentage of total compensation included under the alternative definition of compensation for an employer's highly compensated employees, as a group for the determination period does not exceed by more than a de minimis amount the average percentage of total compensation included under the alternative definition for the employer's nonhighly compensated employees as a group.

(ii) *Total compensation.* For purposes of this paragraph (d)(3), total compensation must be determined using a definition of compensation provided in paragraph (c)(2) of this section, with or without the modification permitted by paragraph (c)(4) of this section. Total compensation taken into account for each employee (including, if added, the elective contributions and deferred compensation described in paragraph (c)(4) of this section) may not exceed the annual compensation limit of section 401(a)(17).

(iii) *Employees taken into account*—(A) *General rule.* In applying the requirement of this paragraph (d)(3), the employees taken into account are the same employees taken into account in satisfying the requirements of the applicable provision for the determination period. For example, in determining whether an alternative definition used to determine whether a plan satisfies section 401(a)(4) satisfies this paragraph (d)(3), all employees in the plan for the plan year are generally taken into account. If an employer is using the same alternative definition of compensation to determine whether more than one separate plan satisfies section 401(a)(4), the employer is permitted to take into account all the employees in all the plans in determining whether the alternative definition of compensation being used satisfies this paragraph (d)(3).

(B) *Exclusion of self-employed individuals.* In applying the requirement of this paragraph (d)(3), self-employed individuals are disregarded.

(iv) *Calculation of average percentages*—(A) *General rule.* To determine the average percentages described in paragraph (d)(3)(i) of this section, an individual compensation percentage must be calculated for each employee in a group, and then the average of the separately calculated compensation percentages for each employee in the group must be determined. The individual compensation percentage for an employee is calculated by dividing the amount of the employee's compensation that is included under the alternative definition by the amount of the employee's total compensation.

(B) *Other reasonable methods.* Notwithstanding paragraph (d)(3)(iv)(A) of this section, any other reasonable method is permitted to be used to determine the average percentages described in paragraph (d)(3)(i) of this section for either or both of the groups (i.e., highly compensated employees and nonhighly compensated employees), provided that the method cannot reasonably be expected to create a significant variance from the average percentage for that group determined using the individual-percentage method provided in paragraph (d)(3)(iv)(A) of this section. The same method is not required to be used for calculating the two average percentages. For example, to determine the average percentage for nonhighly compensated employees as a group, an employer may calculate an aggregate compensation percentage by dividing the aggregate amount of compensation of nonhighly compensated employees that are included under the alternative definition by the aggregate amount of total compensation of nonhighly compensated employees, provided the resulting percentage is not reasonably expected to vary significantly from the average percentage produced using the individual-percentage method provided in paragraph (d)(3)(iv)(A) of this section because of the extra weight given employees with higher compensation.

(v) *Facts and circumstances determination.* The determination of whether the average percentage of total compensation included for the employer's highly compensated employees as a group for a determination period exceeds by more than a de minimis amount the average percentage of total compensation included for the employer's nonhighly compensated employees as a group is based on the applicable facts and circumstances. The differences between the percentages for prior determination periods may be considered in determining whether the amount of the difference between the percentages is more than de minimis. In addition, an isolated instance of a more than de minimis difference between the compensation percentages that is due to an extraordinary unforeseeable event (such as overtime payments to employees of a public utility due to a major hurricane) will be disregarded if

the amount of the difference in prior determination periods was de minimis.

(e) *Imputed compensation*—(1) *In general*—(i) *Overview.* Notwithstanding paragraph (d)(2)(i) of this section, a definition of compensation satisfies section 414(s) as a reasonable alternative definition of compensation under section 414(s) even though it includes imputed compensation that is not includible in compensation under any definition described in paragraph (c) of this section, but only if the definition satisfies the requirements of paragraph (e)(2) or (e)(3) of this section, or both paragraphs if applicable. Paragraph (e)(2) of this section specifies the requirements for alternative definitions of compensation that include compensation based on an employee's basic or regular rate of compensation. Paragraph (e)(3) of this section specifies the requirements for alternative definitions of compensation that credit imputed compensation during certain periods of absence from service. As an alternative definition of compensation, a definition of compensation that includes imputed compensation must satisfy the nondiscrimination requirement of paragraph (d)(3) of this section. Paragraph (e)(4) of this section provides special rules for determining whether a definition of compensation that includes imputed compensation satisfies the nondiscrimination requirement under paragraph (d)(3) of this section.

(ii) *Not applicable to certain contributions.* This paragraph (e) does not apply to a definition of compensation used in determining whether elective deferrals (as defined in section 402(g)(3)), matching contributions (as defined in section 401(m)(4)), or employee contributions subject to section 401(m) satisfy any applicable provision. Thus, for example, a definition of compensation that includes imputed compensation may not be used to measure compensation for purposes of determining if a qualified cash or deferred arrangement satisfies the actual deferral percentage test in section 401(k)(3).

(2) *Rate of compensation*—(i) *General rule.* An alternative definition that defines compensation for a specified period (or series of specified periods) within a determination period based on the basic or regular rate of compensation of each employee as of a designated date in the specified period (or in each of the specified periods in the series) satisfies section 414(s) as a reasonable alternative definition if the definition satisfies the requirements specified in paragraph (e)(2)(ii) of this section and otherwise satisfies the requirements of paragraph (d) of this section, including the nondiscrimination test in paragraph (d)(3) of this section as applied in paragraph (e)(4) of this section.

(ii) *Requirements for definitions of compensation based on rate of compensation*—(A) *Benefit determination.* The alternative definition of compensation must actually be used to calculate the benefits or contributions that are subject to the applicable provision. For example, the alternative definition may not be used to determine whether a plan satisfies section 401(a)(4) with respect to the amount of benefits or contributions, unless the benefits or contributions for each employee in the plan are determined using the alternative definition of compensation.

(B) *Rate of compensation.* The employee's rate of compensation must be based on an hourly pay scale, weekly salary, or similar unit of base or regular compensation applicable to the employee.

(C) *Specified period.* The specified period may be a week, month, year, or other period provided that the period does not exceed 12 months or the determination period, if shorter.

(D) *Date for determining rate of compensation.* Any date during the specified period may be designated as the date on which the rate of compensation is determined provided that the same date is used for all employees taken into account in satisfying the applicable provision. In addition, the date selected, by itself, must not cause the portion of total compensation included for any employee (or group of employees) to vary significantly from the portion of total compensation included for any other employee (or group of employees).

(E) *Periods without compensation or with reduced compensation.* An employee's compensation may generally only be determined using the employee's rate of compensation for employment periods during which the employer actually compensates the employee. However, if an employee terminates employment or is absent from service either without compensation or with reduced compensation (such as for a leave of absence, layoff, or similar event), the employer may continue to credit the employee with compensation based on the employee's rate of compensation for a period of up to 31 days after the event, provided the 31-day period does not extend into a subsequent determination period with respect to the applicable provision. Paragraph (e)(3) of this section contains special rules for crediting compensation during periods of absence from service extending beyond 31 days.

(3) *Absence from service*—(i) *General rule.* Solely for purposes of determining whether a defined benefit plan, as defined in § 1.410(b)–9, satisfies section 401(a)(4) or 410(b), an alternative definition that includes imputed compensation credited to employees during a period of absence from service that is not otherwise includable in compensation within the meaning of section 415(c)(3) satisfies section 414(s) as a reasonable alternative definition if the definition satisfies the requirements specified in paragraph (e)(3)(ii) of this section. In addition, the definition must otherwise be described in paragraph (c) of this section or must otherwise satisfy the requirements of paragraph (d) or (e)(2) of this section for alternative definitions of compensation, including the nondiscrimination test in paragraph (d)(3) of this section as applied by paragraph (e)(4) of this section.

(ii) *Requirements for definitions of compensation crediting compensation during absence from service*—(A) *Absent from service.* For the period during which compensation is credited to an employee, the employee must be absent from service for a reason other than termination from employment with the employer maintaining the plan. If an employee continues to perform any services for the employer during the period, the employee is not absent from service.

(B) *Benefit determination.* The alternative definition of compensation must actually be used to calculate the benefits under the plan. For example, the alternative definition may not be used to determine whether a plan satisfies section 401(a)(4) with respect to the amount of benefits or equivalent allocations unless the benefits for each employee in the plan are determined using the alternative definition of compensation.

(C) *Uniformity.* Any provisions in the plan for crediting imputed compensation while an employee is absent from service must be applied uniformly to all similarly situated employees in the plan.

(D) *Effective availability.* For purposes of applying the effective availability requirement of § 1.401(a)(4)–4(c) to the right to imputed compensation credited under the plan, the manner in which the employer grants absences from service that give rise to imputed compensation is taken into account.

(E) *Period of credited compensation.* In the case of compensation credited for a period during which an employee is

absent from service for any reason other than military duty or jury duty, the maximum period for which the compensation may be credited under the alternative definition is the shorter of 6 months or the duration of the absence. If an employee is absent from service for military duty or jury duty, compensation may be credited to the employee for the entire period of the military duty or jury duty, even if the period exceeds 6 months.

(iii) *Reasonable method.* Any reasonable method may be used to determine the amount of compensation to be credited during an absence from service, provided that the following requirements are satisfied—

(A) The terms of the alternative definition of compensation for imputing credited compensation during an absence from service (when applied to the compensation described in paragraph (e)(3)(iii)(B) of this section) are not more inclusive than the terms of the alternative definition as applied to compensation for actual service.

(B) The amount credited is based on compensation that is reasonably representative of the compensation the employee would have received during the period if the employee had continued to perform services. Except as otherwise required by law, the compensation that the employee was receiving immediately before the absence from service began, or the rate of compensation in effect while the employee is absent from service that is applicable to the employee's specific job grade immediately before the absence from service began, will be the most representative compensation. For example, if an employee's compensation is determined under paragraph (c)(2) of this section for periods of actual service, the compensation credited for the employee during a period of absence from service might reasonably be based on the employee's compensation determined under paragraph (c)(2) of this section immediately before the absence began.

(4) *Application of the nondiscrimination requirement to imputed compensation*—(i) *Safe harbor definitions.* If the definition of compensation is otherwise described in paragraph (c) of this section, and the imputed compensation credited for periods of absence from service satisfies paragraph (e)(3) of this section, then the definition is deemed to satisfy paragraph (d) of this section (i.e., it is deemed to be nondiscriminatory), and thus need not satisfy any other nondiscrimination test under section 414(s).

(ii) *Other definitions.* The amount of each employee's compensation for a determination period (determined under an alternative definition that includes imputed compensation) that is taken into account in determining the average percentages in the nondiscrimination requirement of paragraph (d)(3) of this section must be limited to 100 percent of the employee's total compensation for that period. This rule applies even if the amount of compensation actually credited to the employee for the determination period under the alternative definition and, thus, used as compensation within the meaning of section 414(s), exceeds the employee's total compensation for the period.

(f) *Special rules*—(1) *Self-employed individuals*—(i) *General rule.* If an alternative definition of compensation under paragraph (c)(3), (d), or (e) of this section is used to satisfy an applicable provision, an equivalent alternative compensation amount must be determined for any self-employed individual who is in the group of employees for whom paragraph (b) of this section requires a single definition of compensation to be used. This equivalent alternative compensation amount is determined by multiplying the self-employed individual's total earned income (as defined in section 401(c)(2)) for the determination period by the percentage of total compensation (as defined in paragraph (d)(3)(ii) of this section) included under the alternative definition for the employer's nonhighly compensated common-law employees as a group (determined in a manner consistent with the rules in paragraph (d)(3)(iii) of this section and, if applicable, paragraph (e)(4)(ii) of this section). Thus, for purposes of this determination, highly compensated common-law employees must be disregarded. This equivalent alternative compensation amount will be treated as the self-employed individual's compensation under the alternative definition of compensation for the determination period.

(ii) *Inclusion of elective contributions.* If the alternative definition of compensation includes any types of elective contributions described in paragraph (c)(4) of this section, the self-employed individual's earned income for this determination must be increased by the amount of elective contributions made by the employer on behalf of the self-employed individual, and the definition of total compensation for this determination must include all the types of elective contributions described in paragraph (c)(4) of this section made by the employer on behalf of common-law employees (other than highly compensated employees).

(2) *Leased employees.* [Reserved]

(g) *Definitions.* The following definitions apply for purposes of this section:

(1) *Applicable provision.* "Applicable provision" means a provision that specifically refers to section 414(s) or this section.

(2) *Determinaion period.* "Determination period" means a period during which the amount of compensation is measured for use in determining whether the requirements of an applicable provision are satisfied. If no period is provided under the applicable provision for measuring compensation, the determination period is the period for which the applicable provision must be satisfied. The applicable provision may provide additional rules concerning the determination period to be used for satisfying the nondiscrimination requirement in paragraph (d) of this section.

(3) *Highly compensated employee.* "Highly compensated employee" means an employee who is a highly compensated employee as defined in section 414(q).

(4) *Nonhighly compensated employee.* "Nonhighly compensated employees" means an employee who is not a highly compensated employee.

(5) *Self-employed individual.* "Self-employed individual" means self-employed individual as defined in section 401(c)(1).

(h) *Additional rules.* The Commissioner may in revenue rulings, notices, and other guidance of general applicability provide additional rules for defining compensation within the meaning of section 414(s), including additional definitions of compensation that satisfy section 414(s).

(i) *Effective date*—(1) *General effective date.* This § 1.414(s)–1 applies to years beginning on or after January 1, 1987.

(2) *Optional use of prior regulations.* For years beginning before September 19, 1991, employers may, in defining compensation for purposes of section 414(s), comply with the prior regulation provisions of § 1.414(s)–1T. See § 1.414(s)–1T as contained in the CFR edition revised as of April 1, 1991.

§ 1.414(s)–1T [Removed]

Par. 3. Section 1.414(s)–1T is removed.

Par 4. Section 1.415–2 is amended by revising paragraph (d) to read as follows:

§ 1.415-2 Definitions and special rules.

* * * * *

(d) *Compensation*—(1) *General definition.* Except as otherwise provided, compensation within the meaning of section 415(c)(3) includes all remuneration described in paragraph (d)(2) of this section and excludes all other forms of remuneration. Paragraph (d)(3) of this section provides examples of types of remuneration not includible in compensation within the meaning of section 415(c)(3). Paragraphs (d)(4) and (d)(5) of this section provide rules regarding the payment of compensation in the limitation year. Paragraph (d)(6) of this section provides a special rule for determining the compensation of employees of controlled groups or affiliated service groups. Paragraph (d)(7) of this section provides a special rule for applying the limitations of section 415(c) when a section 403(b) annuity is aggregated with a qualified plan of a controlled employer. Paragraphs (d)(8) and (d)(9) of this section are reserved for special rules for leased employees and for permanent and total disability, respectively. Paragraphs (d)(10) and (d)(11) of this section provide additional definitions of compensation that are treated as satisfying section 415(c)(3). Paragraph (d)(12) of this section permits optional use of prior regulations. Paragraph (d)(13) of this section provides authority to the Commissioner to provide further additional definitions of compensation that satisfy section 415(c)(3).

(2) *Items includible as compensation.* For purposes of applying the limitations of section 415, the term "compensation" includes all of the following—

(i) The employee's wages, salaries, fees for professional services, and other amounts received (without regard to whether or not an amount is paid in cash) for personal services actually rendered in the course of employment with the employer maintaining the plan to the extent that the amounts are includible in gross income (including, but not limited to, commissions paid salesmen, compensation for services on the basis of a percentage of profits, commissions on insurance premiums, tips, bonuses, fringe benefits, and reimbursements or other expense allowances under a nonaccountable plan (as described in § 1.62-2(c)).

(ii) In the case of an employee who is an employee within the meaning of section 401(c)(1) and the regulations thereunder, the employee's earned income (as described in section 401(c)(2) and the regulations thereunder).

(iii) Amounts described in sections 104(a)(3), 105(a), and 105(h), but only to the extent that these amounts are includible in the gross income of the employee.

(iv) Amounts paid or reimbursed by the employer for moving expenses incurred by an employee, but only to the extent that at the time of the payment it is reasonable to believe that these amounts are not deductible by the employee under section 217.

(v) The value of a non-qualified stock option granted to an employee by the employer, but only to the extent that the value of the option is includible in the gross income of the employee for the taxable year in which granted.

(vi) The amount includible in the gross income of an employee upon making the election described in section 83(b).

Paragraphs (d)(2)(i) and (d)(2)(ii) of this section include foreign earned income (as defined in section 911(b)), whether or not excludable from gross income under section 911. Compensation described in paragraph (d)(2)(i) of this section is to be determined without regard to the exclusions from gross income in sections 931 and 933. Similar principles are to be applied with respect to income subject to sections 931 and 933 in determining compensation described in paragraph (d)(2)(ii) of this section.

(3) *Items not includible as compensation.* The term "compensation" does not include items such as—

(i) Contributions made by the employer to a plan of deferred compensation to the extent that, before the application of the section 415 limitations to that plan, the contributions are not includible in the gross income of the employee for the taxable year in which contributed. In addition, employer contributions made on behalf of an employee to a simplified employee pension described in section 408(k) are not considered as compensation for the taxable year in which contributed. Additionally, any distributions from a plan of deferred compensation are not considered as compensation for section 415 purposes, regardless of whether such amounts are includible in the gross income of the employee when distributed. However, any amounts received by an employee pursuant to an unfunded nonqualified plan is permitted to be considered as compensation for section 415 purposes in the year the amounts are includible in the gross income of the employee.

(ii) Amounts realized from the exercise of a non-qualified stock option, or when restricted stock (or property) held by an employee either becomes freely transferable or is no longer subject to a substantial risk of forfeiture (see section 83 and the regulations thereunder).

(iii) Amounts realized from the sale, exchange or other dispositin of stock acquired under a qualified stock option.

(iv) Other amounts which receive special tax benefits, such as premiums for group-term life insurance (but only to the extent that the premiums are not includible in the gross income of the employee), or contributions made by an employer (whether or not under a salary reduction agreement) towards the purchase of an annuity contract described in section 403(b) (whether or not the contributions are excludable from the gross income of the employee).

(4) *Compensation in limitation year.* The compensation (as defined in paragraph (d)(2) of this section) actually paid or made available to an employee within the limitation year is the compensation used for purposes of applying the limitations of section 415.

(5) *Election to use compensation accrued during limitation year*—(i) *Years beginning after December 31, 1991.* For limitation years beginning after December 31, 1991, an employer may not use accrued compensation. Any election previously made to use accrued compensation is not valid for limitation years beginning after December 31, 1991.

(ii) *De minimis accrued compensation.* Notwithstanding paragraph (d)(5)(i) of this section, an employer may include in compensation amounts earned but not paid in a year because of the timing of pay periods and pay days if these amounts are paid during the first few weeks of the next year, the amounts are included on a uniform and consistent basis with respect to all similarly situated employees, and no compensation is included in more than one limitation period. No formal election is required to include the accrued compensation permitted under this de minimis rule. The rule described in this paragraph (d)(5)(ii) does not apply to a section 403(b) annuity contract or to an individual retirement plan (as defined in section 7701(a)(37)).

(iii) *Years beginning before January 1, 1992.* For limitation years beginning before January 1, 1992, instead of using the compensation actually paid or made available to an employee during the limitation year, an employer may elect to use the compensation accrued for an entire limitation year for purposes of applying the limitations of section 415. In the case of a group of employers that constitute either a controlled group of corporations (within the meaning of section 414(b) as modified by section 415(h)) or trades or businesses (whether or not incorporated) that are under

common control (within the meaning of section 414(c) as modified by section 415(h)), the election to use accrued compensation must be made by all members of the group that maintain a qualified plan. Once an election is made, it remains in effect until it is revoked by the employer or group of employers. The rule described in this paragraph (d)(5)(iii) does not apply to a section 403(b) annuity contract or to an individual retirement plan (as defined in section 7701(a)(37)). If, in a particular limitation year beginning before January 1, 1992, a previously effective election to use accrued compensation is revoked or an election to use accrued compensation is made, any amounts taken into account for compensation purposes for any preceding limitation year may not be counted again in determining compensation for the particular limitation year.

(6) *Special rule for employees of controlled groups of corporations, etc.* In the case of an employee of two or more corporations which are members of a controlled group of corporations (as defined in section 414(b) as modified by section 415(h)), the term "compensation" for such employee includes compensation from all employers that are members of the group, regardless of whether the employee's particular employer has a qualified plan. This special rule is also applicable to an employee of two or more trades or businesses (whether or not incorporated) that are under common control (as defined in section 414(c) as modified by section 415(h)), to an employee of two or more members of an affiliated service group as defined in section 414(m), and to an employee of two or more members of any group of employers who must be aggregated and treated as one employer pursuant to section 414(o).

(7) *Special rule when section 403(b) annuity is aggregated with qualified plan of controlled employer.* If a section 403(b) annuity contract is combined or aggregated with a qualified plan of a controlled employer in accordance with either § 1.415-7(h)(2)(i) or § 1.415-8(d)(2), the following rules apply:

(i) In applying separately the limitations of section 415 (b) or (c) to the qualified plan and the limitations of section 415(c) and the exclusion allowance of section 403(b)(2)(A) to the section 403(b) annuity, compensation from the controlled employer may not be aggregated with compensation from the employer purchasing the section 403(b) annuity.

(ii) However, in applying the limitations of section 415(c) in connection with the combining of the section 403(b) annuity with a qualified defined contribution plan or section 415(e) in connection with the aggregating of the section 403(b) annuity with a qualified defined benefit plan, the total compensation from both employers may be taken into account.

(8) *Special rules for leased employees.* [Reserved]

(9) *Special rules for permanent and total disability.* [Reserved]

(10) *Safe harbor rule with respect to plan's definition of compensation.* If a plan defines compensation for purposes of applying the limitations of section 415 to include only those items specified in paragraph (d)(2)(i) of this section and to exclude all those items listed in paragraph (d)(3) of this paragraph, if applicable, the plan will automatically be considered to be using a definition of compensation which satisfies section 415(c)(3).

(11) *Alternative definition of compensation.* In lieu of defining compensation in accordance with paragraphs (d)(2) and (d)(3) of this section, for purposes of applying the limitations of section 415 in the case of employees other than self-employed individuals treated as employees within the meaning of section 401(c)(1), a plan may define compensation using either of the following definitions used for wage reporting purposes, as modified herein, and the definition will be considered automatically to satisfy section 415(c)(3):

(i) *Information required to be reported under sections 6041 and 6051.* Compensation is defined as wages within the meaning of section 3401(a) and all other payments of compensation to an employee by his employer (in the course of the employer's trade or business) for which the employer is required to furnish the employee a written statement under sections 6041(d) and 6051(a)(3). See §§ 1.6041-1(a), 1.6041-2(a)(1) and 31.6051-1(a)(1)(i)(c). This definition of compensation may be modified to exclude amounts paid or reimbursed by the employer for moving expenses incurred by an employee, but only to the extent that at the time of the payment it is reasonable to believe that these amounts are deductible by the employee under section 217. Compensation under this paragraph (d)(11)(i) must be determined without regard to any rules under section 3401(a) that limit the remuneration included in wages based on the nature or location of the employment or the services performed (such as the exception for agricultural labor in section 3401(a)(2)).

(ii) *Section 3401(a) wages.* Compensation is defined as wages within the meaning of section 3401(a) (for purposes of income tax withholding at the source) but determined without regard to any rules that limit the remuneration included in wages based on the nature or location of the employment or the services performed (such as the exception for agricultural labor in section 3401(a)(2)).

(12) *Optional use of prior regulations.* For years beginning before September 19, 1991, employers are permitted, in defining compensation for purposes of section 415(c)(3), to comply with either the provisions of this § 1.415-2(d) or the prior regulation provisions of § 1.415-2(d). See § 1.415-2(d) as contained in the CFR edition revised as of April 1, 1991.

(13) *Additional rules.* The Commissioner may in revenue rulings, notices, and other guidance of general applicability provide additional definitions of compensation that are treated as satisfying section 415(c)(3)

Fred. T. Goldberg, Jr.,

Commissioner of Internal Revenue.

Approved: August 30, 1991.

Kenneth W. Gideon,

Assistant Secretary of the Treasury.

[FR Doc. 91-21925 Filed 9-12-91; 10:53 am]

BILLING CODE 4830-01-M

federal register

Thursday
September 19, 1991

Part III

Department of the Interior

Joint Tribal/BIA/DOI Advisory Task Force on Bureau of Indian Affairs Reorganization, Public Meeting; Notice

DEPARTMENT OF THE INTERIOR

Joint Tribal/BIA/DOI Advisory Task Force on Bureau of Indian Affairs Reorganization, Public Meeting

AGENCY: Department of the Interior.

ACTION: Notice.

SUMMARY: Pursuant to Public Law 101-512, the Office of the Assistant Secretary—Indian Affairs is announcing the forthcoming meeting of the Joint Tribal/BIA/DOI Advisory Task Force on Bureau of Indian Affairs Reorganization (Task Force).

DATES, TIMES, AND PLACE: October 15, 16, and 17, 1991; 9 a.m. to 5:30 p.m. daily; the Anchorage Hilton, Third at "E" Street, Anchorage, Alaska. The meeting of the Task Force is open to the public.

FOR FURTHER INFORMATION CONTACT: Additional information concerning this meeting of the Joint Tribal/BIA/DOI Advisory Task Force on Bureau of Indian Affairs Reorganization may be obtained by contacting Veronica L. Murdock, Designated Federal Officer, at (202) 208-4173.

Agenda

The Task Force will report on and discuss agency organizational proposals developed in consultation with tribal leaders and local Bureau of Indian Affairs officials. The Task Force will also review cost analyses completed in association with these proposals. Time will be available for public comments from those registering to address the Task Force.

Dated: September 11, 1991.

Eddie F. Brown,

Assistant Secretary—Indian Affairs.

[FR Doc. 91-22523 Filed 9-18-91; 8:45 am]

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Vol. 56, No. 182

Thursday, September 19, 1991

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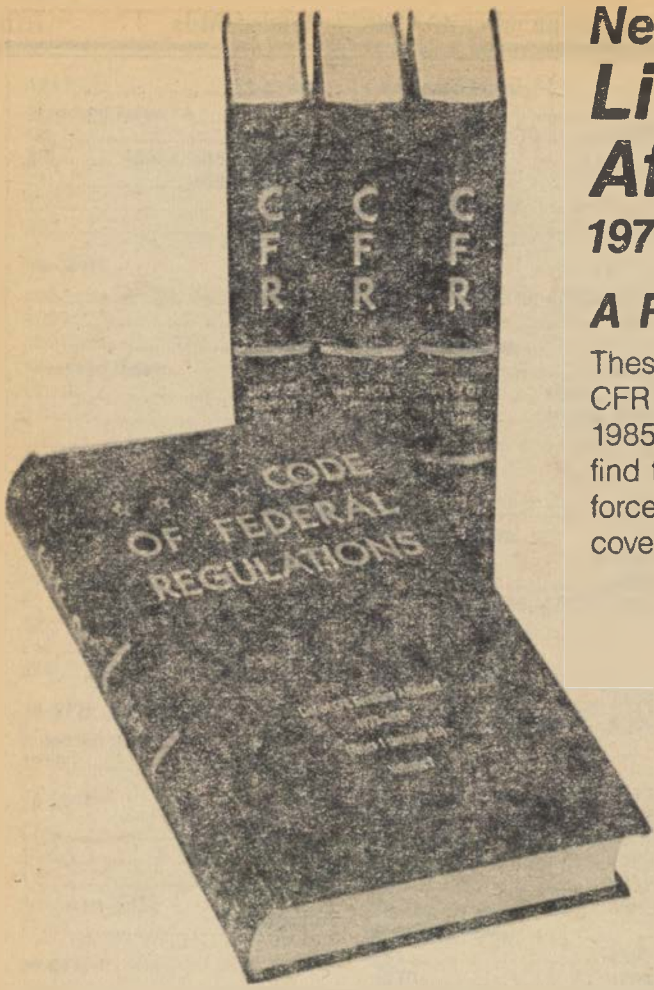

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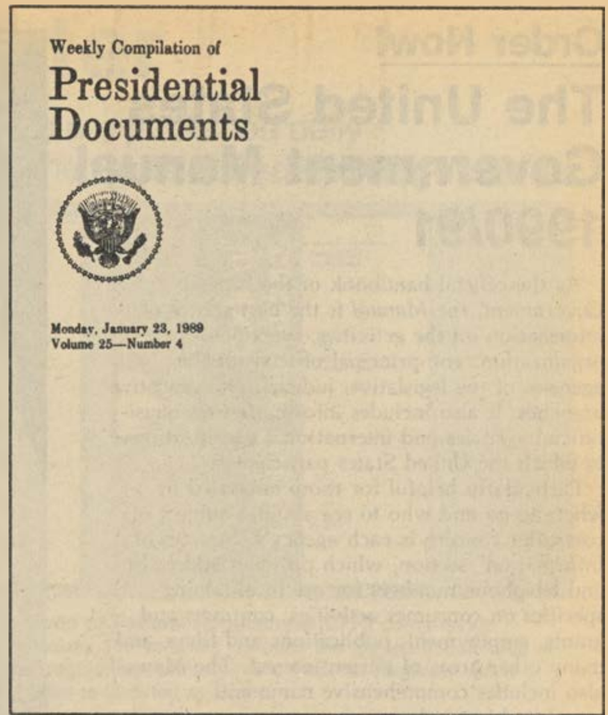

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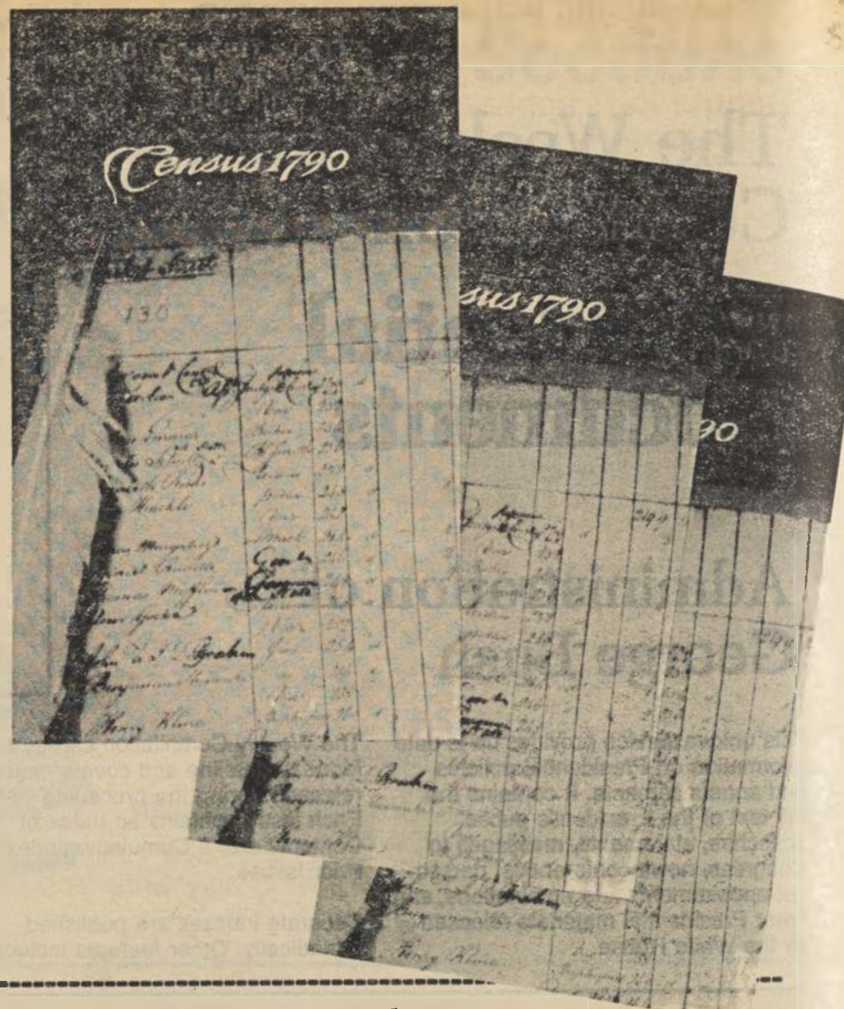

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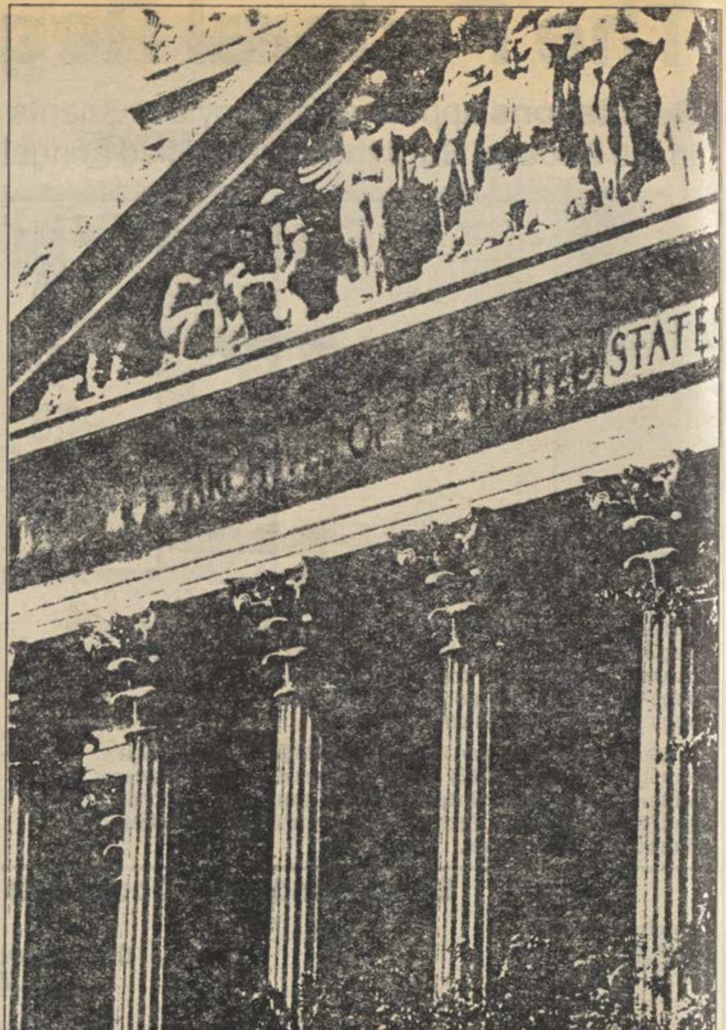

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